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ADMINISTRATION OF JUSTICE IN SCOTLAND.

Debate in the House of Commons.

The state of the supreme court of justice in Scotland, says the London Sun, forms a most singular anomaly in the administration of the laws of the country. Mr O'Connell, in former days, used to paint the Irish bench in most extraordinary colors—describing one judge deaf, others more ignorant of the law than any barrister of two years' practice, and all of them blinded by political prejudice; but if the statements made by Scotch members, in a recent debate in the house of commons, are to be believed, the mode of administering justice in Ireland, must sink into the shade, when compared with the system at present in existence in Scotland. The debate alluded to, was elicited by a motion for a committee to inquire into the mode of administering justice in Scotland. The motion was opposed by the lord advocate, the attorney general, Mr Fox Maule, and others. The last mentioned person, in allusion to the charge of mental imbecility, brought against lord Gillies, said it was not surprising that men of large families should struggle, even under the weight of declining years, to maintain their position and their salaries from the public, to an hour when, perhaps, it would be more prudent that they should retire from the discharge of their public duties. Was it to be surmised that on this occasion, the feelings of a father, in leaning to the interest of his family, should overcome that of looking to the interests of the public? Sir George Clerk denied that there were persons on the bench in Scotland, who were incompetent from mental imbecility, to perform their duty. He wished that honorable gentlemen would look at the voluminous judgments delivered by every judge in that court, in the course of last year. Nothing could reflect greater credit upon any person, than the judicial research, the high learning, and the acuteness displayed in those judgments. Mr Bannerman had been in the court of quarter sessions, at Edinburgh, and had there seen a venerable judge, an honorable and upright man, and heard him deliver his opinion in two short cases. He was in such a state of imbecility, that he regretted to see him, and he was prompted by his brother judges on the right and left, on account of his being exceedingly deaf. Mr O'Connell said the judges of Scotland were not adequately paid for their services. It was impossible they could save money, and yet support their families. It was a paltry species of economy, that they were not allowed to resign on full salaries. Such economy was pursued both in Scotland and Ireland, and was equally bad in both countries. Mr Gillam denied that the judges of Scotland were underpaid. He thought, considering the short period the judges sat, they were admirably paid for the duties they performed. He thought the public money could not be better applied than by giving the judge a proper retiring provision, but it should be at that time of life when they were incapable of performing their duties.

We will now extract the speech of the gentleman who made the motion, merely premising, that it was subsequently withdrawn, the general impression appearing to be, that the course proposed was not the best for remedying existing evils.

Mr Wallace, in rising to move for a committee on this subject, said it would be unworthy the representative of any part of Scotland, to wish for any committee on such a question but one that would consider it with calmness and attention. In 1834, an hon. member obtained a committee to consider of and report as to the salaries of judges of Scotland compared with their duties, therefore he had a precedent for what he now sought—the precedent of 1834. He intended to bring under the notice of the house the constitution of the quarter session—the jury trial in that court—the court of teinds—the mode of trial before the judges in criminal and civil cases—a mode of proceeding in criminal and civil

cases before sheriff's courts of both descriptions. He knew that it was a wide field, but he considered it of such importance as to command the attention of the house for a short time. First, he would call the attention of the house to the fact, that there was a general desire throughout the country for an improvement of the administration of justice. There was a great cry for small debt courts and for local courts throughout this country; so also could he assure the house there was in Scotland. In 1807, lord Grenville, in a most luminous speech, said that there was a great want of good administration of justice in the northern part of this country—the same remark would apply now. He knew that his hon. friends opposite would say that there had been great improvement in the courts of Scotland since 1807, but he begged leave most respectfully to deny that proposition. There had been many alterations and a few improvements, but the lieges were plundered in 1807 by those courts, and they were plundered now. If they denied his statement he challenged them to a committee. He knew that they would not grant it, because they were well aware, that he could prove every statement that he had made. It was a well known fact that more appeals, that many more appeals, came from the small country of Scotland, than from any of the other countries. It was owing to this that there was no such thing as a responsible court in Scotland. The judges were all collected together in such a manner that no one was responsible. The 13 judges were often called upon to give their individual opinion upon a single case, and it was decided by 6 to 7, or 5 to 8. On many occasions such had been the case. Lord Grenville further said that he was most anxious to reduce the great quantity of printed pleadings, which was the great cause of expense and delay. It had been said by high authority in Scotland, that written evidence was no evidence at all. All the evidence taken in a cause in Scotland, must be taken by commission, as it was called—the witnesses went before a third party—their evidence was taken, and then submitted to the judges, and he fully believed that they never read it. (Cries of "Oh, oh.") He did believe that his statement was true; for he thought it to be impossible that any person could read through such a quantity of trash as was taken down as evidence in a cause in Scotland. Why should not the witnesses be brought face to face before the judge, as it was in England? Until such was the case, they would never have justice well administered in Scotland. Another fallacy was, that the judges and sheriffs in Scotland were judges of the law, the fact, and of equity, all in the same person and at the same time; a task that was too great for humanity, even if wrapt up in the shape of a judge. (Laughter.) He would appeal to the hon. member for Dublin, whether it was possible for one man properly to discharge the duties of the whole three. Such was the state of things in Scotland. There was no difference between the time when lord Grenville made the able speech to which he had adverted, and the present moment. His next objection was with regard to the mode in which the court of sessions was constituted. There was no man more unwilling than himself, to allude to anything that would hurt the feelings of any member of that court, but he felt it his duty to do so. Various members of the supreme court in Scotland, from extreme age and infirmities, were totally inefficient. It was true they were all men of high attainments, great legal knowledge, and entitled to the highest respect; but it was his business to state broadly, that the heads of the supreme courts were, from the condition to which he had adverted, unfitted to the situations they filled. An infirmity of a deep nature had afflicted one, and he sincerely hoped that another had only met with a temporary affliction. But what had the latter learned judge done? Why, he had appointed a person to officiate in his absence who had attained, he (Mr Wallace) believed, the age of nearly 90. He admitted that a more eminent individual did not exist; but he thought it was to be lamented that an individual so advanced in life should have been appointed. All the judges on the Scotch bench were men advanced in years, varying from sixty to ninety years. He maintained that if there were fewer judges of less advanced age it would be much better. The infirmities of the judges in Scotland could not be attributable to over labor, for they only sat about two months and four days in the year, and only about one hour and a half, or two hours a day. Now, if more efficient judges

in point of years were appointed, they might sit as the courts in England did, for ten months in the year. For the purpose of showing the difference between the Scotch courts and those in England, he would refer to two returns, one from the courts of common law in Westminster hall, and the other from the Scotch courts. Now, according to those returns in the year 1836, there were no less than 95,964 cases disposed of in the courts of common law in England; of that number, 16,000 were litigated cases, while in the Scotch courts, with 13 judges, there were only 3,960 cases disposed of in the same time. (Hear, hear.) Such was the difference between ten months' sitting, and three months' sitting. Every judge in Scotland had his country seat, and were the people of this country to be kept out of justice, year after year, because the judges chose to take their pleasure? He thought that the people of Scotland ought to have the justice and the pleasure too.

As proof of how the system was carried on, he would just refer the house to returns which he had received last year relative to the sheriffs' courts in the county of Renfrew, and the result of which was an exposure that would not perhaps be generally believed. Having reduced the return into figures and facts, he would read them to the house, and it would appear that the average endurance of actions (omitting all those for small sums, and which had not lasted longer than a year,) was three years and ninety-three days; the average time each sheriff had delivered judgment was four; and the average time during which the cases had been lying on the shelf waiting for judgment was 277 days. That there might be no mistake about the matter, he had the return carefully examined and condensed. He might, perhaps, be told that a royal commission had sat for the purpose of discharging the same duty which he proposed should be done by that committee. He would read to the house the opinion of one of the judges of that law commission, and he begged to call their particular attention to it—"My friends, as there are no reporters present, I may privately tell you you need not be under any apprehension on account of the law commission interfering with the court of session practice.—(Laughter.) The old writers are too shrewd to break their own heads."—("Name.") If he got the Committee he would at once name them.—(Laughter.) He thought he had got a better hold by not naming the individual. With respect to the jury trials, there had been no return made; but he was disposed to think that the same objection would be found to prevail in that department. He would now come to speak of the court of teinds. Many Scotch gentlemen present were aware that in various parishes disputes had been going on, and from the protracted nature of the proceedings in these courts, litigation had been going on in these parishes for 50 years. He now came to a subject of very great delicacy, and he approached it with the more reluctance when he considered the unimpeachable character of his learned friend opposite. He came to the criminal part of the Scotch jurisdiction, and he believed that it was in a still more objectionable state than any other department. It was beyond the power of nature that his learned friend could give proper attention to all details. He would ask the house how lord advocates had obtained their appointments? Were they not gentlemen of the bar, and had they not won their way, as his learned friend had most distinguishedly in the same manner as his predecessor? Their system of circuits, (and he was sure the learned attorney general would agree with him) was most improper. They had none but mere youths and tyroes—no men of eminence went among them—and he would ask why?—Because jury trials did not extend to civil cases. In a period of four years there had been only twentysix jury trials, being an average of six and a quarter for each year. He did not mean to allege any thing improper against his learned friend. There was no compromise of principle, on his part, and he felt much pleasure in making that statement; but he pledged himself that there was a system going on in the administration of criminal justice which was exceedingly injurious to the ends of justice. The power was vested in young gentlemen. The power which was vested in the young gentlemen who acted as the deputies of his learned friend was most dangerous and improper. There was a great waste of money, and a most immoral system; but although he had made the most minute inquiries on the subject, he believed that those gentlemen were

entirely free from any charge of that description. It was the system he impugned, and not the persons engaged in it. He went to Glasgow the other day, and he must say that a most indecent system was carried on in those courts, where one young gentleman could say who was to be tried and who was to be acquitted. It was absolutely necessary, with a view to the general revision of that system, that a committee should be granted, and it would be necessary to look into the jurisprudence of the criminal courts, as well as of their civil establishment. With regard to the sheriffs' courts, he would not enter largely upon that subject, because he had brought it before the house last session. He contended, however, that the other house of Parliament should not be allowed to throw out bills of very great public importance. With respect to his bill of last session, no reason had been assigned by lord Haddington, for throwing it out upon the second reading. The sheriffs sit without going to the public at all; they consult merely the convenience of themselves, and of the profession, and never take the public into consideration; they seem to be of opinion that the people were made for the lawyers, and not the lawyers for the people. He had written to a gentleman, a friend of his, to go to Neile & Co., the printers, in Edinburgh, and purchase two of these papers for him, and dissect them. What was the answer? They told him that he had no business to come there and purchase them—that they were private property, and that they would not sell them. He would do the hon. and learned gentleman opposite the justice to say, that he was not to blame for the existence of this state of things; he had always attended to any suggestion which might be made with the greatest attention, but whenever anything important or just was in contemplation on this subject, it was invariably counteracted by some higher authority. He did not believe the honorable and learned gentleman opposite had any thing to do with this. No. It was some power behind the scenes. It seems fated that whenever any good is intended for us, some countervailing power comes between us and the good. The advocates of Edinburgh, by means of these acts of sederunt, levy a tax of upwards of two millions a year on the inhabitants of Scotland. The lawyers of Edinburgh pronounce and publish these acts of sederunt altogether without the knowledge of the people, and this exclusive system is maintained for the exclusive benefit of the profession. Why should these gentlemen tax laws? In this house, if the chancellor of the exchequer wishes to impose a tax, he must move for leave to bring in a bill, and that bill must be read a first, a second, a third time, and attention be given to it in every step of its progress. Not so the lawyers of Scotland. They sit in their parliament house, and call themselves lords of session; because we have not had the sense to deprive them of it, these lords of sessions pass their bills with closed doors; there is no watch over them, no hon. member for Salford to stop them, because it is 12 o'clock.—(Hear, hear.) All was done in secret; those whose persons were to be sweated were never told of it, but those who were to put money into their pockets by it were well advised of the proceedings. Look at what Jeremy Bentham had predicted with regard to the improvements which had been proposed for the benefit of Scotland. Not one atom of good, said Jeremy Bentham, will ever come from those improvements in Scotland, because that country is so fettered by the legal profession, that they will prevent it. He would ask the attorney general if he really believed Scotland was only fit to try jury cases in Edinburgh? Why may not juries try cases of the value of 5*l.* quite as properly as cases involving limbs and life? He would relate a case which had happened in the town which he represented: two boys were apprehended on a charge of stealing two shirts, the value of 9d., and tried by a jury; but if, instead of being stolen, these shirts had been made the subject of a civil proceeding, and valued at ninepence, no sheriff in Scotland would have impannelled a jury to try the cause. What had Lord Brougham said when he abandoned his bill for the establishment of local courts?—"But for this, and could it go to the value of 20*l.*, I would sweep clean Westminster hall." The honorable gentleman said he quoted from memory, but such was the substance of what Lord Brougham had said. Why should not the same system be introduced in Scotland? just because a little more grass would grow

in the streets of Edingburgh than does just now. The counties at present tried every case but those trenching on the legal profession of Edinburgh. He would desire to draw the attention of the honorable member for Elgin to what took place in the county of Perth. In the court house of Elgin, during last session, the decrees of the sheriffs' substitute were 3,887, and the appeals to the sheriffs amounted to 118. Does not this demonstrate that this system is kept up for the purpose of appointing Edinburgh lawyers to the sinecure sheriffships? The civil cases decided by the sheriff depute, amounted to 2,506, and the criminal cases 213; these last were the only cases tried by juries: Is not this system monstrous? He wished the attorney general to answer this, 6,000 or 7,000 cases were decided by the sheriffs' substitutes, and 3,600 only by the sheriffs. It was in vain to endeavor to enforce this case more than he had done. He would state to the house what he had witnessed in 1836 at Glasgow. He had gone to that city on purpose to see two jury cases tried. He (Mr Wallace) had attended the trial of civil cases in Glasgow. There were several which occupied two or three days each. What was the reason for all that array? Simply that the cases had been instituted in the session court in 1834, and tried (in Glasgow) in 1836—because two years must elapse before any jury case could be tried which had been instituted in the court of session. What just cause was there assignable for such delay?—why should there be such a facility afforded to wealthy injustice, for the prolonging of suits and of thus overcoming the rightful, and perhaps poor claimant, through the heavy expenses thereby incurred? It certainly could not be difficult to find a remedy for evils so glaring, and the cause of which he was sure could not be found in the law of Scotland. He saw no means of effecting this object but by appointing a committee. As to the appointment of the commission—for the members of which he had the greatest respect—it was a most unjustifiable commission in every respect; for the members of it had all, if not interests, strong prejudices, which precluded them from impartially considering the subject. It was most unjust that at a time when almost all monopolies were abolished, except in the city of London, this monopoly, obnoxious as it was, should be allowed to continue. The honorable member concluded by moving the appointment of a committee to inquire into the mode of administering justice in Scotland.

AMERICAN CASES.

SUPREME COURT.

PENNSYLVANIA, JULY TERM, 1838.

Moritz v. Barnhart.

A plaintiff, *in loco parentis*, may maintain an action on the case for an abduction, from his protection, of his daughter's illegitimate offspring.

By the return to this writ of error, the action appeared to have been case *per quod servitium amisit* in the common pleas of Northumberland county, for the abduction of Rebecca McEwen, an infant of six years, and the illegitimate child of the plaintiff's daughter, who had resided with him from its birth.

Merril assigned for error, that the jury had been directed to find for the defendant, on the ground that the action could not be supported without proof of hiring or specific acts of service. *Jordan, contra*, argued that an action for the abduction of an infant, cannot be maintained on the parental relation alone; and cited Ashm. 55, Cowp. 54, 8 Johns. 332, 6 Mass. 273, 15 Mass. 290, 11 Mass. 67.

The opinion of the court was delivered by

Gibson, C. J.—The court below directed that the relation of master and servant could not be constituted to maintain the action without hiring. Such indeed was the ancient rule of the common law; and, in the case of an ordinary servant, such it is still. In the case of a child, however, it is so far relaxed, that employment in occasional acts of service, even after the period of infancy, is equivalent to a state of servitude. The most frequent instances of its mitigated operation, are found in the action for seduction, grounded, technically, on the relation of master and servant, but requiring, by reason of the plaintiff's paternity, no more than slight and desultory acts of service when the child has come of age. Yet a state of servitude of some sort, must be established, to give the parent the rights of a master. And this re-

laxation has not been superinduced by the peculiar turpitude of seduction, the more readily to get at the punishment of it as a particular wrong; but it holds indifferently in cases of seduction, abduction, and corporal injury, without regard to the sex. In an action for an assault on the plaintiff's infant son, lord Kenyon went the whole length of dispensing with proof of employment, and held it sufficient for the action that he was living in the father's family and under his protection. *Jones v. Brown*, (Peake's N. P. C. 233: S. C. 1 Esp. N. P. C. 217.) If, then, the plaintiff in the case at bar, were the father, there would be a sufficient implication of servitude from the relation of father and child; but to the illegitimate offspring of his daughter he is not legally related; and whether he may have an action *in loco parentis*, is a question which occurs for the first time. Why may he not? Though a bastard be not looked upon, for any civil purpose, as a child, the ties of nature are regarded in respect to its maintenance. The putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody of it. In the *King v. Cornforth*, (2 Stra. 1162) the court granted an information for the abduction of a natural daughter from the protection of her putative father, on the ground that a bastard is within the 4 and 5 Phil. and M. c. 8, which punishes the taking away of any maid or unmarried woman's child from the possession of the father, mother, or person having the governance of it. Betwixt the father and the mother, the latter seems to have the prior claim; (*Ex parte Knee*, 1 N. R. 148,) for if the father obtain the custody surreptitiously, the king's bench will make him restore it. *Rex v. Soper*, (5 T. R. 278;) S. P. *Rex v. Mosely*, (5 East. 224;) and *Rex v. Hopkins*, (7 East. 579.) Indeed, it seems to have been doubted in *Strangeways v. Robinson*, (4 Taunt. 498) whether he has a right to the custody in any case; yet in *Rex v. Cornforth*, (more fully given in 1 Bott's Poor Laws 465) it was said that a putative father has a natural right to the education and care of his illegitimate child; and in *Richards v. Hodges* (2 Saund. 83) as well as in *Newlin v. Osman*, (1 Bott's P. L. 466) he was allowed to take it from the parish and maintain it. It may safely be asserted, then, that the law recognizes the rights of putative paternity for purposes of nurture and education. Here, both the father and the mother had abandoned those rights; and shall their existence not be recognized in the person of the grandfather, so far as to induce a relaxation of the rule which ordinarily requires proof of service by hiring, in an action for the deprivation of it? He is, indeed, not a parent, but he is contingently chargeable, by the poor laws, with the duties of one. The rights of a parent are pupillary; and as they are given for the benefit of the child, the person who exercises them must have a correlative remedy for the infraction of them. Independent of actual consanguinity, however, there is an interest which seems to be peculiarly his own, and proper for personal compensation. Who has not seen an adopted child become an object of as tender a solicitude as if it had issued from its fosterfather's loins; and can it be said that, having bestowed his affection upon it and reared it by his bounty, he yet shall not be allowed to perform the office of a father to it against an intermeddler? Policy requires, on behalf of a helpless outcast and waif on the surface of society, that rights so sacred to humanity, should be respected. And the stern simplicity of feudal principles, is gradually bending to the more complicated relations of a milder civilization. So late as *Barnham v. Dennis* (Cro. Eliz. 770) a father had no remedy for the abduction of any of his children but the heir at law; and now, by means of a servitude almost fictitious, power is put into his hands to redress almost every wrong that may be done to them. And it seems to be a natural and a necessary measure, to put the same power into the hands of every one who acts a father's part. The defendant is a stranger in blood. He is the father of the mother's husband; but it appears not that he acted by her authority, nor is it clear that she herself could have arbitrarily resumed it. After an abandonment of it for six years, she could have reclaimed it only through the order of a court, who would not lightly deprive the fosterfather of the expected fruit of his pains in the service and duty of the child. It is alleged without proof, that its morals were endangered by the associations of the family; but though that might be a reason for summary interference by the competent authority, it could operate here only in mitigation of damages. On the facts

in evidence, then, the plaintiff had made out a case to recover.

Judgment reversed, and a *venire facias de novo* awarded.

SUPREME JUDICIAL COURT.

BOSTON, MARCH TERM, 1839.

Hobart v. Andrews.

Where notes and other papers have been placed in the hands of a creditor as collateral security, and sufficient has been collected to pay the principal debt, the debtor has a remedy in equity to compel the creditor to account.

Whether the assignor of a *chose in action* should be made a party to a suit in equity by the assignee—*quære.*

In a bill by the second assignee of a *chose in action*, it is not necessary to make the first assignee a party.

Collateral securities to creditors are considered as trusts.

The plaintiff's equity should appear in the stating part of the bill.

Under the circumstances of this case, held, that the assignor of a *chose in action* should be made a party.

Bill in Equity.—The plaintiff's title or right of action was derived under several assignments from T. H. Carter. The bill set forth, that in the year 1829, it was agreed by E. T. Andrews, the defendant, and Carter, that the former should endorse the paper of the latter, for the purpose of raising funds; and that in pursuance of such agreement, the defendant did from time to time, endorse said Carter's paper; that, in 1834, the said Carter became much embarrassed, and that therefore the defendant proposed to loan him $2000, and to take as security certain notes of hand secured by mortgage for $4000 or $5000, and that these notes and other securities were transferred to the defendant, he promising to account therefor, and to pay over the balance, after satisfying himself for his claims on the said Carter. That after these dealings, said Carter failed, and assigned all his property and demands to David L. Child and R. B. Carter, on trust for his creditors; and that afterwards the said assignees for the purpose of closing the assignment, for a valuable consideration, assigned all the remaining property in their hands, and their claims on the defendant, to Nathaniel Hobart, the plaintiff. That after the assignment to the plaintiff, he requested the defendant to make out a true account and to pay the plaintiff such sum as might be found due, which the defendant refused. The bill charged, that on a just settlement there would be a large sum due to the plaintiff.

The prayer of the bill was that the defendant might be held to render an account under the direction of the court, and that accounts which had been settled might be opened, and that the defendant might pay over what is due to the plaintiff, and deliver up securities. The defendant demurred to the bill.

The case was argued by *T. P. Chandler* for the plaintiff, and by *B. Rand* for the defendant.

WILDE J.—The first objection in support of the demurrer is that T. H. Carter, D. L. Child, and R. B. Carter, should have been made parties. In the argument of the case, however, the defendants counsel did not rely on the objection in relation to D. L. Child and R. B. Carter, and it is very clear that it was not necessary nor would it have been proper to have made them parties to a suit in which they have no interest. They never had any legal right or title to sue the claims assigned to them by T. H. Carter, and their equitable right has been assigned to the plaintiff, so that no decree in this case can affect them. But the defendant's counsel insists that T. H. Carter, having the legal right to sue the defendant on the demands assigned, should have been made a party, either as plaintiff or defendant, to prevent future litigation.

This question does not seem to be well settled. The decisions in the cases cited are conflicting, and are not easily to be reconciled.

The rule laid down by Daniel in his treatise on chancery practice, (1 Dan. 291) is that where the subject matter in litigation is a chose in action which has been the subject of assignment, the assignor, or if dead, his personal representative, should be a party: for as an assignment of a chose in action is not recognised in a court of law, and is only considered good in equity, the recovery in equity by the assignee would be no answer to an action at law by the assignor, in whom the legal right to sue still remains, and who

might exercise it to the prejudice of the party liable; in which case the party liable would be driven to the circuitous process of filing another bill against the assignor, for the purpose of restraining his proceedings.

This rule is not conformable to the doctrine laid down by Lord Hardwicke, in the case of *Brace v. Harrington*, (2 Atkins 235.) He says, "it is not necessary in every case of assignments, where all the equitable interest is assigned over, to make a person who has the legal interest a party." So in *Blake v. Jones*, (3 Anst. 651) the court say, that the bill was well enough without making the representative of the assignor a party. But in the modern English decisions, the rule is laid down substantially as stated by Daniel.

The principal reason of the rule is not fully applicable to the law as understood in this commonwealth; for here we do take notice of an equitable assignment, and payment by the defendant of the amount due on the account to the plaintiff, and the delivery over of the notes or other property in his hands would undoubtedly be a good bar to any action at law in the name of the assignor, whether the payment and the delivery over of the property were in pursuance of a decree of a court of equity or not.

If, however, the plaintiff should fail to recover in this suit, it might be doubtful whether a decree in his favor could be pleaded in bar to an action at law. The question, then, is whether the English doctrine is to be adopted here, supposing it to be as laid down by Daniel, and in the cases cited in support of it. The doctrine is denied by Mr Justice Story in his commentaries, and in the case of *Trecothick v. Austin*, (4 Mason 16.) The true principle would seem to be, as he says in his commentaries, that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party, (Story's Equity Pl. 148.)

Without deciding at present between these conflicting authorities, we are of opinion, that in the present case, the assignor ought to be made a party; because it appears by the bill, that his liability to the defendant may be affected by the decree. The notes and other property transferred to him by T. H. Carter, were transferred as collateral security, and consequently if they should be found to be insufficient to satisfy the defendant's claim, Carter would be liable to him for the balance. In which case he ought to be a party so as to be bound by the decree as to the amount of the avails of the notes and property transferred as collateral security.

The next objection to be considered, is that the plaintiff has an effectual and convenient remedy at law. This objection, we think clearly cannot be sustained.

By the revised statutes, ch. 118 sec. 43, the action of account is abolished; and it is provided, that when the nature of an account is such, that it cannot be conveniently and properly adjusted and settled in an action of assumpsit, it may be done upon a bill in equity. The defendant is charged as trustee, and if the trust should be established, the plaintiff will be entitled to a discovery, without the benefit of which, we cannot say that the account could be properly adjusted in an action of assumpsit. And independently of the above provision of the revised statutes, we cannot doubt that this bill may be sustained as founded on a trust, for a case rarely occurs where a party has a plain, adequate and complete remedy at law, for a breach of trust especially where a party is entitled to a discovery.

The remaining objections relate to the supposed insufficiency of the bill.

It is objected that the prayer of the bill, among other things, is, that certain accounts which had been settled might be opened, and a true and just account taken, without specifying the particular errors which are sought to be corrected. As to one of these accounts, it is stated that the sum of $120 was charged for endorsing a note for $2000 payable in six months, equal to 12 per cent. per annum, which was allowed by mistake, the plaintiff claiming only six per cent. at the time. This mistake and error is sufficiently certain; and as to the other accounts settled, it is said by the plaintiffs counsel, that he does not seek to open them, and without a specification of errors he will not be permitted to prove them at the hearing. This objection, therefore, is not material.

Then it was objected, that the plaintiff does not aver in the stating part of the

bill, that any balance is due to him, and, therefore, admitting the case stated, the plaintiff is not entitled to the relief prayed for.

The general rule is, that the plaintiff's equity should appear in the stating part of the bill; and this being the settled form of pleading, there can be no reason given why it should not be observed.

Another objection is, that the bill does not state that the securities were ever demanded, and strictly this ought to be averred.

The only remaining objection is, that the plaintiff's title is not set out with sufficient certainty. It is averred, that for a valuable consideration, the claims of T. H. Carter on the defendant and the property in his hands as collateral security were assigned to the plaintiff. The objection is that it is not stated in what manner the assignment was made. The rule as to this matter is that where the nature of the conveyance is such that it would be valid without deed or writing, there no deed or writing need be averred. Thus a conveyance with livery of seizin may be pleaded without alleging any charter of feofment, whether such instrument in fact accompanied the conveyance or not, as at common law such conveyance might have been made by parol. So it is not necessary to aver that an agreement within the statute of frauds was in writing, (1 Dan. 473.) If the assignment, however, was in writing and was conditional, the condition should be set forth as was determined in the case of *Walburn v. Ingilby*, (1 Milne and K. 77.) But the assignment is averred to be absolute, and if it should appear at the hearing that there was a condition, the performance of which the plaintiff would be bound to show, the variance may be then taken advantage of.

Demurrer allowed.

Clark v. Flint and others.

Where an objection to the jurisdiction of the court, as a court of chancery, is not taken till the hearing, it will not be entertained unless there be a total want of jurisdiction.

A judgment against an insolvent is not such a remedy at law, as will prevent the court exercising its chancery powers.

A court of equity will compel the specific performance of a contract relating to personal property when the remedy is imperfect at law.

EQUITY.—The bill set forth, that in March, 1830, Isaac Clark, J. P. Flint & J. C. Flint, of Boston, made a purchase of the brig Charles, with an agreement between themselves that the two Flints should take the conveyance in their names, and should hold one half in trust for Clark. That the Flints subsequent to the purchase, acknowledged by a written instrument that they held one half the brig in trust, and for the benefit of said Clark, and promised to give him a good and sufficient bill of sale thereof, at any time upon request. That afterwards the two Flints associated themselves in business with one Sherman G. Hill, and did business afterwards in the name of P. & C. Flint & Co. That on the 4th day of February, 1834, Isaac Clark conveyed all his right, title and interest in the brig to the plaintiff. That the plaintiff addressed a written order and request to P. & C. Flint & Co. to hold one half of the brig to the plaintiff's order, and that the order was accepted by the firm in writing. That on the eighth day of February, 1834, the firm of P. & C. Flint & Co. made an assignment of the part of the brig belonging to the plaintiff to Charles W. Cartwright & Enoch Train, two of the defendants, in trust, to sell and dispose of the same, and apply the proceeds to discharge the debts due from the said firm to their creditors. That the plaintiff requested said assignees to convey one half of the brig to himself, but they have and do refuse so to do.

Washburn for the plaintiff.

B. Rand for the defendant.

WILDE J.—This is a bill to compel a specific performance of a written agreement, which the plaintiff alleges was made between him and P. & C. Flint & Co. in relation to the brig Charles. The suit was commenced in 1834. At the hearing in 1837, the counsel for the defendants raised an objection to the jurisdiction of the court, which was met on the other side by the position that the objection was made too late, the defendants having put in an answer, and that the objection ought to have been taken by demurrer.

At this stage of the proceedings, the court will not entertain an objection of this kind, unless there is a total want of jurisdiction. But the court are clearly of opinion, that they have jurisdiction in the present case. The only question, then, is, whether if the plaintiff makes out his case, he is entitled to re-

lief. We think he is. At law he cannot reach Cartwright & Train, the assignees, and his only remedy is against P. & C. Flint & Co., who are insolvent.

We do not think that a judgment against an insolvent is such a remedy as will prevent a court of equity from acting, although there was an intimation to that effect in a case decided by the supreme court of the United States.

It was said in the agreement, that courts of equity will not compel a specific performance of a contract which relates to personal estate; but this rule has so many exceptions that it cannot be relied on with much confidence. The distinction between contracts relating to real and personal property is not very satisfactory, and, in general, when a party has no adequate remedy at law, equity will relieve him.

Driscoll and others v. Fiske.

Where in an assignment by two copartners for the benefit of their creditors of all their property not exempted by law from attachment, express reference was made to other and fuller schedules of the property assigned, to be annexed, and no mention was made in those schedules, of any individual property, it was held, that the household furniture of one of the firm was not included in the assignment.

This was an action of trespass, brought against the defendant, who is a deputy of the sheriff of the county of Middlesex, to recover the value of certain furniture, attached by him, as the property of George W. Light, in a suit brought by Benjamin Bradley against said Light and Josiah A. Stearns, on the 15th of June, 1837.

The furniture in question, was the property of Light, but was claimed by the plaintiffs as his assignees, under an assignment made by said Light & Stearns, for the benefit of their creditors, dated April 7, 1837. To this assignment, Light & Stearns, who were then partners in the bookselling business, were parties of the first part, William Brigham and Cornelius Driscoll, the plaintiffs, of the second part, and the creditors of Light & Stearns, who should become parties to it, of the third part. By this instrument, Light & Stearns assigned to the plaintiffs "all their books, stock in trade, printing apparatus and machinery, books of account, book debts, notes and demands, and all other property of every name and nature except such as is exempt from attachment—most of the same property being now at their place of business at No. 1 & 2 Cornhill, in said Boston—a schedule of which is hereunto annexed."

The assignment after the usual provisions proceeds; "And it is farther agreed that other and fuller schedules of the property hereby assigned, shall be hereunto annexed as soon as the same can be conveniently made."

The schedule annexed was in the following words:—

"SCHEDULE.

"Stock of books in store valued at —
"Printing presses and materials " —
"Notes and demands, &c. " —

Immediately after the assignment was made, Light & Stearns took an account of the property, and filled up the blanks in the schedule so that it read—

"Stock in trade in store valued at		$9190,06
"Printing presses and materials	"	2000,00
"Notes and demands, &c.	"	5680,36
		16,870,42
"Debts,		13,870,45
"Balance,		2,999,97"

This schedule thus altered, was exhibited by Light and Stearns to their creditors, most of whom subsequently and before this attachment, became parties to the assignment. No inventory of Light's furniture was ever made by the assignees, and it remained in Light's possession until the time of the attachment. A few days after the attachment was made, one of the assignees added the following words to the schedule of the assignment, to wit:

"Individual property,	$600,00
	3,599,97"

Mr Light testified, that he intended to have the furniture covered in the assignment, and he supposed it was. This evidence was objected to by the defendant.

The case was submitted to the court upon a statement of facts as above.

Brigham for the plaintiffs.

Sewall for the defendant.

PUTNAM J.—The phraseology of a part of the assignment would be sufficient to include this property, but express reference is made in the body of the instrument to the schedule, and this as a part of the assignment is to be con-

sidered, in order to ascertain the intention of the parties. Now, not the slightest mention was made in the schedule first prepared, of any individual property, and when another was made, nothing is said in that. It was not till after the attachment was made that anything of the kind was expressed, and any addition to the instrument then, can have no effect against the claim of the attaching creditor. Nor can the testimony of Mr Light be received. Without inquiring into the meaning of the word "covered", as used by him, we are clearly of opinion, that his evidence tends to contradict rather than to explain the instrument, and is not admissible.

The true doctrine as to the construction of assignments was laid down in *Tucker v. Clisby*, (12 Pick. 22.)

On the whole, we think that the furniture was not included in the assignment, and that it is held by the attachment.

Plaintiff nonsuit.

Eaton v. Dugan and Trs.

In an action of debt on a simple contract for rent, the plaintiff will not be allowed to abandon the contract and recover for use and occupation.

DEBT.—The writ set forth, that the plaintiff, Ezra O. Eaton, demised to the defendant, Ann Dugan, "the second and upper stories of a messuage and house with the appurtenances, situated in Ann street, in said Boston, and numbered two hundred and thirteen therein, to have and to hold the same to her for a certain time, to wit, for one month, and so from month to month while said lease continued, yielding and paying therefor so long as she should hold the same, the sum of twelve dollars and fifty cents each and every month, payable in advance on the fifteenth day of each month. By virtue of which demise said Dugan entered into and was in possession of said premises until the fifteenth day of July last, when a large sum of money, to wit, twentyfive dollars for said rent was due."

At the trial in the court below, no written contract was produced or proved to have ever existed, by which the plaintiff demised the premises to the defendant, or had agreed to permit her to occupy them for any length of time or for any certain rent.

The judge instructed the jury, that if such a contract was made between the plaintiff and the defendant, and was not in writing, it would not be binding upon the parties, being within the statute of frauds; and if the plaintiff had proved to their satisfaction, that he had permitted the defendant to occupy the whole of the rooms mentioned in the plaintiff's declaration, or any part of them, and for the whole time set forth or any part of it, and the defendant had so occupied by such permission, they would be justified in returning a verdict for the plaintiff, for such sum as they should find the use and occupation of the rooms the defendant so occupied, were reasonably worth.

The jury returned a verdict for twentyfive dollars and thirtyeight cents. The case came up on exceptions to the ruling of the judge.

Paine for the plaintiff.

Simonds for the defendant.

DEWEY J.—The instructions of the judge to the jury were wrong. In an action of debt on a simple contract, the contract must be set forth with great particularity. There must be no variance. The plaintiff must prove his declaration. In this case the plaintiff wholly failed in establishing the contract which he set up, and he was permitted to go into matter which would have been very proper under the general counts, but which was wholly improper in a case like the present.

Exceptions sustained—Cause remanded to the court of common pleas for further proceedings.

Wild v. Hobart.

An usurious transaction in relation to a bill of exchange, between the drawer and the holder is no defence to an action against the acceptor.

ASSUMPSIT on a bill of exchange for $5000, payable in six months, drawn by Robert M. N. Smyth, and accepted by the defendant, Thomas Hobart. The defence was usury. At the trial before *Dewey J.* the defendant proved by one Whitney, that he was the agent of Smyth in negotiating the sale of this bill; that he sold it to the plaintiff for the sum of $4,400, it being then agreed between him and the plaintiff that a discount of $600 should be made on the amount of the same; that he received the said $4,400, and paid the same to Smith.

The defendant claimed upon this evidence, that he was entitled to the benefit of the statute, against usury. By consent, the defendant was defaulted, subject to the opinion of the court.

Fuller & Smith for the plaintiff.

Miller for the defendant.

Shaw C. J.—The court are of opinion that the transaction between the drawer and the holder of the bill cannot affect the acceptor.

Judgment for the plaintiff.

Overseers of the Poor of Boston v. Sears, et ux.

The points of difference between sole and aggregate corporations considered.

The Overseers of the Poor of Boston, are a corporation aggregate.

It is not necessary that corporations aggregate should have the power of electing their own members; it is sufficient if some way is provided by which their continuance is ensured.

The better opinion is, that town officers hold their offices until others are chosen.

This was a writ of right to recover certain land in the westerly part of the city of Boston. The plaintiffs count on the seizin of their predecessors within forty years. The defendants demurred, and objected that the plaintiffs were a corporation aggregate and came within the statute limiting real actions to thirty years.

Pickering & Bartlett for the plaintiffs.

Mason & C. P. Curtis for the defendants.

Shaw C. J., in delivering the opinion of the court, went into the subject of the difference between sole and aggregate corporations, at great length. A grant to a corporation aggregate carries the fee without the word *heirs*. Such a corporation may take personal property, which a sole corporation cannot. It may have a common seal and may make bylaws for the regulation of its affairs. It must appear by attorney; it must have a clerk, and keep a record of its proceedings. It may elect members to fill vacancies when not contrary to its charter. (2 Kent's Com. 177.) In all these particulars the difference between a sole and aggregate corporation was striking. Applying these principles to the act forming the plaintiffs into a corporation, it would be seen that they had all the characteristics of an aggregate corporation.

It was not claimed by the plaintiffs, that they are a sole corporation, but that they more resemble one than they do a corporation aggregate; and it was argued that they are elected yearly, and cannot perpetuate the corporation by electing new members, and that there may be a time when it will be extinct. But it is not necessary that corporations should have the ability to keep up the succession by electing its own members. All that is necessary is, that there should be *some provision* by which the succession shall be kept up. A large proportion of the corporations aggregate in this commonwealth, have no power to elect their own members. By statute, deacons are made a corporation for certain purposes, and they are elected by the churches; and these latter have been held not to be corporations. And in general, if any way is provided in which the corporation will continue to exist, it is sufficient; and the provision that the overseers of the poor of Boston, shall be elected at certain periods, is as effectual to keep the corporation in existence as though they had the power of electing their own members. So in most of the quasi corporations in this commonwealth; the members are not elected by the corporation, but there is no danger of the corporation ceasing to exist; the better opinion being that town officers hold their offices until others are elected. Nor is the argument well founded, that if every annual election was not a succession in regard to the plaintiffs, the change of the town of Boston to a city had that effect. This argument proves too much for the plaintiffs, for the effect of this change was either a continuance of the corporation, or the corporation has ceased to exist. It is not necessary to inquire into the reason why a corporation sole should be limited to forty years, and a corporation aggregate to only thirty; but it may be satisfactory. The former comes into possession a comparative stranger. Much time may be required to ascertain the rights and duties of the corporation. But in the case of a corporation aggregate, although all the members may be new, yet the records are at once the evidence of and the means of enforcing their rights.

On the whole, the court are of opinion, that the plaintiffs are an aggregate corporation, and must count on their own seizin within thirty years, and not having done so the demurrer was well taken.[1]

Copeland v. New England Marine Insurance Company.

Before Mr Justice Wilde and a jury.

If the master of a vessel become incompetent to the command before the vessel sails from her outward port, the mate ought to take command; and if the vessel sails under the command of the master, she is unseaworthy. But if the master become incompetent after the ship sails, the vessel is not thereby rendered unseaworthy.

This was an action on a policy of insurance on the brig Adams, Capt. Gillespie, from Wilmington, N. C. to Jamaica, and back to her port of discharge. The vessel was lost on her return voyage, on the Isle of Pines, coast of Cuba. It was agreed, that if the plaintiff recovered, the amount should be about $2600. The defendants contended, and offered evidence to prove that the vessel was not seaworthy when she left Jamaica; that there was a deviation; and that the loss was intentional on the part of the master.

Simmons for the plaintiff.

W. D. Sohier for the defendant.

Wilde J. instructed the jury, that the burthen of proof was on the plaintiff, to make out his case. It was in evidence that the vessel was staunch and strong, when she left Wilmington; that the captain was a man of much skill and enterprise; and that there was no cause of complaint till the vessel left Jamaica. The case had some remarkable features. The captain was sick on the outward voyage, and when he reached Jamaica his conduct was very boisterous and strange. He quarrelled with his physician; he was almost constantly intoxicated, and it was for the jury to consider whether his intoxication arose from mental derangement brought on by his sickness, or whether his derangement was produced by drunkennesss. If he was deranged when the vessel left Jamaica, the mate ought to have taken charge. And if the jury were satisfied that the vessel sailed under the command of a captain, who was incompetent from any cause, and that the vessel *might have been* lost from such incompetency, the underwriters were excused, and it made no difference if the loss was from a cause which had no relation to the captain's incompetency. But if the captain was competent to the command when the ship left Jamaica, then, although he afterwards became incompetent by sickness or intoxication, and the vessel was lost, the defendants would be liable. The second ground of defence was that the loss was fraudulent. On this point the plaintiff insisted that some adequate motive must be shown for the act, or the jury ought to negative the idea. But it would not do to carry this notion too far. A great many of the acts investigated by courts of justice were founded on no assignable motive. Besides, if the captain was insane, and had got an idea about stranding his vessel, this was motive sufficient. On the whole, if the jury were doubtful whether the captain was competent when he left Jamaica, or whether the vessel was lost by the perils of the seas, they were to find for the defendants.

The jury returned a verdict for the defendants.

DEDHAM, MASS. FEBRUARY TERM, 1839.

Daniels v. Pond.

In the case of a lease of a farm, when no agreement is made by lessor or lessee, as to the manure made by the products and by the cattle; it belongs to the lessor.

Where in such a case the lessee sells the manure and it is removed; trespass is the proper remedy, by the owner or those holding under him against the purchaser.

Whether the doctrine first above stated, would apply to the case of a livery stable hired for a year or years—*quære.*

Trespass by carrying away, by the defendant, several loads of manure which the plaintiff alleged to be his property. The facts were, in substance, these: I. Blake owned a farm, in Franklin, which he let, by an oral lease, to E. Nayson, from April 1st, 1836, to April 1st, 1837. No agreement was made, between Blake and Nayson, concerning the manure that should be made on

[1] The plaintiffs, after this decision, asked leave to amend and count on their own seizin within thirty years, which was granted. See *Overseers of the Poor v Otis* (1 Law Reporter 31.)

the farm during the year for which it was leased.

In December, 1836, Blake conveyed the farm to the plaintiff, by a deed which was duly executed and recorded.

A few weeks before the 1st of April, 1837, Nayson sold at auction, a considerable portion of his personal property, and also the manure in dispute. One of the conditions of sale was that the manure should be taken away before April 1st. Blake and the plaintiff both gave notice, at the time of the auction, that the manure belonged (as they insisted) to the plaintiff, and that whosoever should purchase it would remove it at his peril. The defendant heard this notice given, but bought the manure and removed it to his own land.

Part of the manure was made in the barnyard, being a compost, and was laid in a heap, some time in the autumn of 1836 by the roadside near the barn. Another part was at the stable windows, on the outside of the barn. And all of it was made on the soil or fodder of the farm, and by Nayson's cattle.

The plaintiff's deed included the road by the side of which part of the manure had been placed by Nayson.

Metcalf for the plaintiff.

Merrick for the defendant.

Shaw C. J. delivered the opinions of the court, that the plaintiff had well maintained his action; that when no agreement is made by lessor or lessee, as to the manure made from the products and by the cattle, &c., on a farm, it belongs to the lessor, and the outgoing tenant has no right to carry it away, and can confer no such right on another. That when the plaintiff purchased the farm, the manure then upon it passed to him with the land, Blake not having reserved it—and that what was afterwards made, belonged also to the plaintiff. (6 Greenleaf, 222; 3 N. Hamp. Rep. 503; 2 Chipman, 108.)

The court were also satisfied that trespass was a proper action in this case. Mason was a tenant at will, under the statute of this commonwealth, and his possession was the possession of the plaintiff. (11 Mass. Rep. 519.) Besides, Nason had committed waste by selling the manure, and thus his tenancy was determined.

The court, however, did not intend to be understood to decide that this doctrine would be applied in the case of a livery stable, hired for a year or years. The decision now made includes only the case of a lease for agricultural purposes.

SUPREME JUDICIAL COURT.

BANGOR, MAINE, JUNE TERM, 1837.

Warren and others v. *Bartlett and others.*

The usual contract lien upon lumber, for the price of the stumpage attaches to the proceeds in the hands of a *bona fide* purchaser, for a valuable consideration, who had notice of the lien.

Assumpsit for money had and received. At the trial before *Perham J.*, in the court below, it appeared, that the plaintiffs, who were owners of a tract of timber land, in 1834, gave to one William Bailey, a permit in writing, to cut timber therefrom, reserving to themselves the usual lien upon the timber for stumpage, which it was agreed by the permit, should be paid in June, 1835. Bailey immediately on taking said permit, assigned it to the defendants, and all lumber that might be cut under it, as security for supplies to be furnished by them in carrying on the business of lumbering. Bailey cut a large quantity of lumber in the winter of 1834–5, and drove his logs to the booms in the spring after. He sawed the larger part at the mills in Orono, during the summer of that year, and run the lumber after it was sawed, to the defendants, at Bangor, who acted as his consignees, and sold the boards, and credited him with the proceeds, charging him with the customary commissions on such sales. A small portion of the lumber had come into the hands of the defendants in June, when the stumpage fell due. Bailey was at that time in good credit, and so remained during the whole of the year 1835, and till after the commencement of this action. The plaintiffs had knowledge that the defendants received and sold said lumber, but gave no notice to them that they should claim pay of them, till just before the commencement of this action. At the time the suit was brought, the defendants had received and credited Bailey as the proceeds of

sales, more than the amount of the plaintiff's claim for stumpage, but had not received in all enough to repay the amount of their advances for supplies. There was a quantity of logs in the booms in value about equal to the plaintiff's claim for stumpage, and there were other logs further up the river.

A verdict was returned for the plaintiffs, and the cause was brought up to this court on exceptions to the ruling of the judge.

McGaw, Allen & Poor, and J. Appleton for the defendants contended—

1. That the plaintiffs had a lien only upon the lumber which gave them a right to the possession and no more.

2. That their remedy was upon the thing, and was lost by a neglect to retain possession.

3. That the plaintiffs waived their lien by permitting the lumber to be sold after their claim for stumpage fell due. They held a claim upon Bailey, and looked to that for security instead of the lumber.

4. That to allow the proceeds to be drawn from the hands of *bona fide* purchasers, would be against the interests of trade.

E. Brown & Warren for the plaintiff.

Weston C. J. delivered the opinion of the court at a subsequent term, that the plaintiffs had never parted with their property in the lumber, and might in this form of action recover the proceeds from any purchaser who received the lumber, with a knowledge of the plaintiffs' lien.

Judgment on the verdict.

Bailey v. Butterfield.

The proper remedy against an officer for official neglect, is an action on the case, and not assumpsit; and by electing the latter form of action the tort is waived, and the sureties on the officer's bond are discharged.

This was an action of debt on a constable's bond, against the defendant as surety, brought in the name of the plaintiff as treasurer of the town of Milford, for the benefit of one Elijah Winslow, in pursuance of the statutes of Maine, chapters 91 and 92, which provide that any person aggrieved at the neglect or misdoings of any constable or sheriff, and having ascertained the amount of his damage by a judgment against the principal, shall have a right to prosecute in the name of the treasurer of the town, or in the name of the treasurer of the state as the case may be, and for his own use, a suit on the bond, &c.

To prove a breach of the conditions of the bond in this case, the plaintiff introduced a a copy of a suit and judgment against the principal, in favor of said Winslow, charging him in an action of assumpsit on an account annexed, with the amount of an execution alleged to have been collected and since paid over, in which suit judgment was entered on a default. The cause was tried before *Perham J.* in the court below, and came up on exceptions to the rulings of the court, which were in favor of the defendant.

J. Appleton, in support of the exceptions, contended—

1. That the judgment against the principal in the constable's bond, proved an injury suffered by the plaintiff on account of the *neglect* and *misdoing* of the officer.

2. The statute not prescribing the form of action, any kind of suit which shows neglect or misdoing of the officer is sufficient to prove a breach of the bond, whereby to charge the surety.

J. A. Poor for the defendant argued,

1. That sureties on a sheriff's or constable's bond are liable for official default and misdoing of the principal, not for his contracts falling without the scope of his authority as an officer.

2. That assumpsit is a remedy applicable to contracts only, and a resort to it in a case of tort is a waiver of the tort.

3. That the official neglect or misdoing of an officer is a tort, and the proper remedy is a special action of the case.

McMillan v. Eastman (4 Mass. R. 378); 3 Blackstone Comm. 165; 1 Comyn's Dig. 408; 4 Burrows' Rep. 2345.

4. Recovery must be against an officer *ex delicto* for a misfeasance.

People v. Speaker (18 John. 390).

Weston C. J. delivered the opinion of the court at a subsequent term, in favor of the defendant, and gave it as the law, that the proper remedy against an officer for official neglect or misdoing, is an action on the case and not assumpsit. That by electing to bring assumpsit the tort was waived, and the plaintiff's only remedy was against the principal on his implied promise, for which the surety on the bond was not holden.

MUNICIPAL COURT.

BOSTON, JUNE TERM, 1838.

Commonwealth v. Whitney.

A witness was asked, if the signature of a certain paper shown to him, was in his hand writing. It was held, that he was not bound to answer the question, until he had seen the contents of the paper.

In an indictment for forgery, the act was charged to be done with intent to defraud one D. F. Held, that the intent to defraud D. F., was material, and must be proved.

Forgery must be of the name or writing of another without his consent, express or implied. If a person writes the name of another to an instrument with his assent, express or implied, it is not forgery.

If one signs the name of another to an instrument, with the honest belief that he had authority to do so, it would negative the intent to defraud.

If a person passes a note as genuine, knowing it to be forged, the law infers that the intent was to defraud, because it is the natural consequence of the act.

THE defendant, George C. Whitney, was tried on two indictments, for uttering two notes of hand, one for $800 and the other for $1600, purporting to be given by himself to George Whitney, with forged endorsements on the same, he knowing at the time that the same were forged, and with intent to defraud one Dana Fay.

The signatures to the endorsements alleged to have been forged, were those of George Whitney, the father, and David M. Whitney, a brother of the defendant.

The indictments had been pending several terms, but the trials were delayed on account of the absence of George Whitney and David M. Whitney, who concealed themselves, that they might not be compelled to attend as witnesses for the prosecution. But they were brought into court, at the May term, and ordered to recognise each in one thousand dollars, with surety, for their appearance to testify at the trial.

S. D. Parker for the commonwealth.

W. Brigham and *P. Sprague* for the prisoner.

In the course of the cross-examination of George Whitney, Brigham presented to him a paper, on which was written the name of the witness, and he was asked if it was his hand writing. The writing to which the signature was attached, was covered with an envelope, so that nothing appeared but the name. The witness requested to see the paper, as well as the signature; but the counsel refused, and said that his object was to test the ability of the witness to recognise his own hand writing. Both the attorney for the commonwealth and the witness appealed to the court. The counsel for the defendant said, that such a question, for like purpose, and in this form, had been allowed to be put to a witness in a trial in the Supreme Judicial Court.

The Judge ruled, that although the question might be put to the witness, and he might answer it; yet the court would not compel him to answer, unless he were permitted first to see the instrument on which the signature was written. A view of the paper would assist both his memory and judgment. The question proposed to him in the present form, was calculated to create confusion in his mind; and a witness on the stand was entitled to the protection of the court, so as to give his testimony with full knowledge and deliberation. A person might be deceived by the imitation of his own hand writing, as well as in that of a stranger. It was well known too, that signature might be imitated so exactly, as to deceive the individual whose signature was forged.

The witness declined to answer without first seeing the paper.[1]

THACHER J., in summing up said—

Forgery consists in falsely making a writing to the prejudice of another person's

[1] In the argument of Mr *Sprague*, for the prisoner, he commented with great severity both on father and brother, for appearing at the trial and testifying against their immediate relative, whereby he might be subjected to an infamous punishment.

But they were compelled to attend and testify as witnesses. It is true, that they were restrained by the strong ties of natural affection, and by the repugnance which all good minds feel to disclose a case of domestic turpitude. But is a parent bound, by affection, to sacrifice himself and his deserving children, to screen one guilty son from the legal consequences of his misconduct? A parent assumes a weighty responsibility, when he snatches a great offender, even though his son, from merited punishment. It appeared too, that both father and brother had for years after, defendant commenced business, assisted him with their names and credit. We can rarely go behind the curtain, and see all that is transacted within the domestic circle.

right, and with the intent to defraud. To utter such a paper, knowing it to be false, and with the intent to defraud another, is an offence of equal magnitude with the original forgery, and is punished with like severity. The present indictments are founded on the Revised Statutes, ch. 127, sec. 2d, and are for uttering two forged endorsements on promissory notes, with intent in each case to defraud one Dana Fay.

To support these indictments it is necessary to be shewn, that the defendant, having these notes in his possession, uttered them, that is, passed them to Dana Fay, with the intent to defraud him. He might have been charged, generally, under the 14th sect. of the same chap. of the R. S. "with an intent to defraud;" in which case, if it should be shown at the trial, that he intended to defraud Dana Fay, or George Whitney, or David Whitney, or any other person, it would authorize your verdict against him. But the indictment alleges, which therefore is a material allegation, and must be proved, that the intent was to cheat or defraud Dana Fay; and if you are not satisfied, that he intended to defraud him, you must find the defendant not guilty.

If the defendant knew that the endorsements were false, and that he had no authority to pledge the names of George Whitney and David M. Whitney, for these notes, and yet deliberately passed them as genuine securities to David Fay, the law will infer the intent to defraud him; because it naturally results from the act. For neither George nor David M. Whitney, were answerable for the notes; at least, the whole burden is thrown on the defendant to prove, that it was a *bona fide* act on his part, and that he did not intend to defraud. If I present and pass to the foreman a bill, with the name of one of my friends upon it, but knowing at the time, that it was a forged signature, it would be idle to say, that I had no intent to defraud. I could not expect that such friend would pay it, after discovering the ill use which I had made of his friendship.

The question will then arise, and you must inquire 1st, whether the endorsements were forged; and 2d, whether the party on trial knew that they were forged. As to the 1st, not only do father and brother say, that they never signed these endorsements, but no witness has been brought forward to testify, that he believed that the signatures were genuine. It is testified also, that the defendant admitted both to father and brother, that they were false.

But it has been contended, in the defence, that although the signatures to these endorsements were not genuine, yet that the defendant was authorized to write and use the names both of George and David M. Whitney in this way, and that they were bound by his act.

If it were true, that he had authority to use their names, it would follow, not only that they would be bound by the endorsements, and liable to pay the notes, but also that the notes were not uttered with intent to defraud. If Dana Fay received a good endorsed note, he could not be defrauded by it, even although the parties should not be able to pay the money.

If the father and brother had, in repeated instances, paid notes to which their signatures had been affixed by the defendant, without remonstrance or objection, it might be fairly inferred, that they had authorized him to use their names in this way.[1] But the father and brother not only deny the signatures, but that they ever gave to defendant authority to use their names. They declare, that they have never paid notes for him, to which he had forged their signatures. Formerly, they say, they endorsed his notes; but for a year and more before this transaction, they had refused to lend him their names.

Now, it is for the defendant to prove, that they expressly or impliedly authorized him to use their names and credit in this way. To take it out of the case of a fraudulent uttering of these notes, it is not sufficient that he relied on their paternal and brotherly affection to pay the notes, and so to screen him from the legal consequences of his criminal conduct.

If there was not an actual authority, still, if the defendant had fair ground to consider, that he had such authority, that would negative the intention to defraud, and would relieve him from the imputation of guilt, which arises out of this transaction.

As the defendant made the notes himself, he could not be ignorant, that the signatures to the endorsements were false. And I think, unless you believe that he was authorized to

[1] *Regina v. Parish.* 8 Car. & Payne 94 *Reagin v. Beard.* Ib. 143.

use the names of father and brother, if not by an express, at least by a clearly implied authority, or unless he had fair ground to believe it, you will be bound to find him guilty.

Verdict guilty. The defendant appealed to the next supreme judicial court.

NOTE.—At the following term of the supreme judicial court in Suffolk, the defendant having retracted his plea of not guilty on both indictments, was sentenced on each to a period of confinement in the state prison.

DIGEST OF AMERICAN CASES.

[Selections from XX. Pickering's Reports.]

ADMIRALTY.

1. THE judgment of a court of admiralty upon a libel filed against the master of a vessel by one of the crew, complaining of an assault and battery and imprisonment alleged to have been committed on the high seas, is not a bar to an action by the mariner against the master in a court of common law, for an assault and battery and imprisonment on shore in a foreign port in the course of the voyage. *Adams v. Haffards*, 127.

2. In such action, the fact of the mariner's being found on shore by the mate, and imprisoned by him, in pursuance of orders given upon the high seas by the master, was considered to be immaterial; and an instruction to the jury, that if any part of the acts which constituted this trespass and imprisonment were committed by the defendant on board the vessel, the court of admiralty might hold jurisdiction of the plaintiff's complaint, was *held* to be erroneous. *Ibid.*

ALIEN.

An alien husband who makes the preliminary declaration of his intention to become a citizen, before the death of his wife, and completes his naturalization after her death, is not entitled to her land as tenant by the courtesy. *Foss v. Crisp*, 121.

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. An order or draft for a part only of a debt due from the drawee to the drawer, does not, against the consent of the drawee, amount to an assignment, for the debtor is not to be subjected to distinct demands on the part of several persons, when his contract was one and entire. *Gibson v. Cooke*, 15.

2. A promissory note founded on the payee's agreement to convey to the promisor land belonging to a third person, is not invalid on the ground of want of consideration. *Trask v. Vinson*, 105.

3. If the owner of such land conveys the same to the promisor, in execution and pursuance of the payee's contract and the promisor accepts the title, the promisor cannot object in an action upon the note, that the payee did not at the time when the note was given, disclose his want of title to the land. *Ibid.*

4. A book belonging to a bank, and labelled "Notices to Indorsers," in which the entries were in this form—

"Discount. Sept. 1-4

A. B. . . 100 . . Lady . . House
C. D. . . 100 . . on desk . . C. R.

Attest E. F., Messenger."

not stating that A. B. was maker, and C. D. indorser, nor that notice was given to the indorser after a demand on the maker, was *held* to be admissible in evidence to prove a demand on the maker and notice to the endorser of a note discounted by the bank, it being first testified, that it was the duty of E. F. as messenger to make a demand on the makers and give notice to the indorsers of notes held by the bank, and make the entries in the book, that the entries were in his handwriting, and that he had deceased. *Washington Bank v. Prescott.*

5. Where four notes made by the same person and indorsed by the defendant were in the hands of the same holder, and the defendant, before any of them became due, gave holder an order for the payment of the notes (without expressing any priority) out of property conveyed by the maker to assignees, by an indenture to which the indorser was a party, for the payment of the notes in full or proportionably, which property proved to be insufficient, and the assignees, in pursuance of the order, made a payment, after all the notes had fallen due, and the holder applied the money to all the notes *pro rata*, instead of applying it wholly to those which had first fallen due, it was *held*, that he had a right to make such application. *Ibid.*

6. In an action on two of the notes, it was *held*, that the other two, with the indorsements thereon, were admissible in evidence, in order to explain the appropriation of the money paid on the order. *Ibid.*

7. It was *held*, that the jury, in assessing the damages in such action, were not to regard any dividend which might in future be paid upon such order. *Ibid.*

CONTRACT.

Where the defendant verbally requested the plaintiff to assist the defendant's son in his business, promising to indemnify him against any loss he might incur in so doing, and the plaintiff accordingly signed a note as surety, with the son as principal, which he afterwards paid, and called upon the defendant for indemnity, it was *held*, that the defendant's promise was not within the statute of frauds. *Chapin v. Lapham*, 467.

CONVEYANCE.

1. Where a boundary line in a deed of conveyance is described as measuring a certain number of feet, "more or less," and there is nothing in the deed itself or in the subject to which it applies, to explain the description, the number of feet mentioned is to be deemed the precise length of the boundary line. *Blaney v. Rice*, 62.

2. Where a deed of a part of a tract of land described such part as running back from a street 85 feet, more or less, and bounded in the rear on land of the grantor, being a part of the same tract, and the grantor, some time afterwards, but before he had sold any more of the land, prepared and put on record, a plan of the land, in which the part granted was laid down as 88 feet in depth from the street, it was *held*, that the case came within the rule of fixing a monument or abuttal soon after a conveyance, and that the grantee took according to the plan. *Ibid.*

3. Where the owner of land lying between and abutting on two parallel streets granted a part of it, describing it as fronting on one of the streets and running back 85 feet, "more or less," and subsequently granted another part, describing it as fronting on the other street, and running back 80 feet, and bounded on the first part, when according to the measurements there would be a narrow strip between the two parts, but the second deed referred to a plan on which the dividing line was laid down as 80 feet from the street last mentioned, it was *held*, that the second grantee took 80 feet in depth, according to the plan, and no more. *Ibid.*

4. Where a deed from V to P, conveying several parcels of land described by metes and bounds, contained the clause, "meaning and intending hereby to convey all the real estate which I derived under the deeds recorded in Suffolk registry of deeds," (citing several deeds by book and leaf,) "to all which deeds reference is to be had," it was *held*, that a parcel of land conveyed to V by a deed thus referred to, and no otherwise described in the deed from V to P than by such reference, passed by the deed from V to P. *Foss v. Crisp*, 121.

5. A conveyance made to defraud creditors is good as against the grantor and his heirs; and if they subsequently convey the same land to a grantee, who has constructive or actual notice of the prior conveyance, such grantee must, in order to avoid the prior conveyance, prove that he was a purchaser for a valuable consideration. *Clapp v. Tirrell*, 246.

6. The clause in a deed acknowledging payment of the consideration, is mere *prima facie* evidence, and may be controlled and rebutted by parol evidence; and where the deed is impeached on the ground of fraud, it is the lowest species of *prima facie* evidence; inasmuch as the same motives which would lead parties to make a fraudulent conveyance, would induce them to insert, in the strongest terms, an acknowledgment of the payment of the consideration. *Ibid.*

COSTS.

Where a bill in equity to recover a legacy is rendered necessary in consequence of an ambiguity in the terms of the bequest, the costs of suit are not to fall upon the particular legacy, but are to be paid by the executor out of the general assets in his hands. *Sawyer v. Baldwin*, 378.

COVENANT.

In an action for a breach of a covenant against incumbrances, the plaintiff may recover in damages the amount of money fairly

and justly paid by him to remove an incumbrance, although it was paid after the action was commenced. *Brooks v. Moody*, 474.

DAMAGES.

In estimating the damages sustained by an individual by reason of his land being taken for public use, the jury may rightfully be influenced by their general knowledge and experience of like subjects, as well as by the testimony and opinion of the witnesses. *Patterson v. Boston*, 159.

DEED.

A grantor, upon signing a deed, put it before the grantee, saying "there is no go back from that," and the witnesses then subscribed their names; a note, which was to be the consideration of the deed, was not handed to the grantor, but the two papers were taken up by the grantee, and the parties went to a magistrate in order that he might take the acknowledgment. The acknowledgment was accordingly taken and certified, but the grantor withheld the deed from the grantee, and the grantee did not then assert or claim that it had been previously delivered, and the grantor, in his answer to a bill in equity, denied that it had been delivered. It was *held*, that a delivery had been proved. *Mills v. Gore*, 28.

DEVISE.

A testatrix, after various bequests of articles of furniture and other personal property, proceeded as follows; "I do hereby give and bequeath to B all the residue of my furniture and estate, whatever and wherever it may be." It was *held*, that real estate of the testatrix did not pass by such residuary devise as against her heirs, it appearing, that the description of the property of the testatrix in the will was wholly confined to personal chattels, that there were no words indicating an intention on her part to devise all her property, and that there remained articles of furniture and other personal property not specifically disposed of in the will. *Bullard v. Goffe*, 252.

EASEMENT.

1. The erection of a wharf below low-water mark, without authority from the legislature, gives the builder no possession and no color of title beyond the limits of the land under water actually covered by the wharf, and does not draw after it any exclusive right to the use of the open space by the side of it, for the purposes of a dock, by way of easement as appurtenant to the wharf. *Gray v. Bartlett*, 186.

2. Such open space below low-water mark being a public domain, the use of it by the builder of the wharf for the purposes of a dock, with the acquiescence of any individual, does not establish an easement as against such individual. *Ibid.*

3. If the owner of a parcel of flats covers the whole of the same, to low water mark with a wharf, he does not thereby assert the claim of a right to lay vessels upon the flats of an adjoining proprietor, and therefore the silence of such proprietor during the erection of the wharf, is no evidence of his tacit acquiescence in such a claim. *Ibid.*

EQUITY.

1. If upon a demurrer to a bill in equity, it appear that the plaintiff is entitled to relief as to some of the matters set out in the bill, and not as to others, the demurrer should be overruled, unless the bill be multifarious. *Dimmock v. Bixby*, 368.

2. Where an insolvent debtor assigns his property to trustees for the benefit of his creditors, and various questions of difficulty arise from the conflicting claims of creditors, which it might not be safe for the trustees to decide without the directions of the court, they will be entitled to such directions; and they will not be obliged to wait until they are sued by the creditors, but may file a bill for the purpose of obtaining the same. *Ibid.*

3. Where the property of an insolvent debtor is assigned for the benefit of his creditors, although the creditors must join in a bill brought for the purpose of compelling a distribution of the trust fund, yet if the assignees violate their trust to the injury of a particular cestui que trust, he will have his remedy in equity. *Ibid.*

4. So if in such case the assignees enter into the usual covenants for the performance of their trust, and there is a breach of such covenants, to the injury of any one of the covenantees, he can maintain an action at law without joining the covenantees, although the covenants are joint in their terms. *Ibid.*

5. A bill in equity is not *multifarious* where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights. *Ibid.*

6. Where the bill filed by the assignees of an insolvent debtor prayed the aid and directions of the court in relation to the conflicting claims of the creditors, and the order in which they should be paid, and also prayed for relief against the debtors of the assignor and sought to enforce the claims of the assignees against them, it was *held* that as these two branches of the bill were founded on distinct right, they could not be joined. *Ibid.*

EVIDENCE.

Where a witness, upon being shown a writing certified that a notice of a sale was posted up in his inn, testified that the signature was in his hand writing, and that he had no doubt the certificate stated the truth though he did not recollect the fact, it was *held*, that the posting up of the notice was duly proved. *Alvord v. Collin*, 418.

HUSBAND AND WIFE.

Upon a bill in equity by husband and wife to recover a legacy to the wife, *it seems*, this court have power to require the husband to make a suitable provision for the wife out of the sum to be recovered. *Sawyer v. Baldwin*, 375.

INSURANCE.

1. In a policy upon a ship it was stipulated, that the underwriter should not be liable for a partial loss unless it should amount to fifty per cent., and that the assured should not abandon for damage merely, unless the amount, under an adjustment as of a partial loss, should exceed half of the amount insured. The ship was stranded, and the assured offered an abandonment, but the underwriter refused to accept it; and, against the will of the assured, the underwriter, within a reasonable time, got her off and repaired her for less than half of the amount insured, and delivered her to the assured. It was *held*, that the interference of the underwriter in saving and repairing the ship was justifiable, and that inasmuch as he was not to be liable for a loss not exceeding half of the mount insured, he was entitled to recover of the assured the amount of the expenses of saving and repairing the ship. *Commonwealth Ins. Co. v. Chase.*

2. The plaintiff and two others contracted for the purchase of a ship, paid part of the price in cash, gave their joint and several notes for the remainder, and received possession of the ship, but the vendor retained the legal title, with authority, in case the price should not be paid, to sell the ship and apply the proceeds to the notes. The plaintiff caused a sum to be insured on the ship, for whom it might concern, payable, in case of loss, to the vendor; and after a partial loss, the vendor repaired and sold the ship and paid himself out of the proceeds; and the other two contractors assigned to the plaintiff all their interest under the contract, and all benefit to be derived therefrom. It was *held*, that the plaintiff and the other two contractors had an insurable interest; and that the plaintiff might recover on the policy for the whole of the partial loss, by an action in his own name alone, but that he should aver the interest truly in his declaration, viz. that the policy was made for the use of himself and the other two, and that they were jointly interested at the time when the policy was made and when the loss happened. *Rider v. Ocean Ins. Co.*

3. The opinion of such vendor, formed after the repairs were made, upon an examination of the documents and evidence, as to the loss being of such a character and extent as to constitute a legal claim against the underwriters, was *held*, not to be admissible in evidence. *Ibid.*

4. In such action a motion of the defendants, (who had not filed any set-off,) that the sums due to them from the plaintiff should be deducted (according to the terms of the policy) from the loss to be paid, was overruled; but judgment was delayed, in order that the defendants might bring a cross action, without prejudice, however, to the lien on such judgment for the fees of the plaintiff's attorney. *Ibid.*

5. In a policy of insurance on a vessel engaged in the coasting trade, it was stipulated that the insurance company were not to be "liable for any damage to or from her sheathing." It was *held*, that if this was to be considered as a representation that the vessel was sheathed, it was immaterial, there being evidence that sheathing was not con-

sidered of advantage to a vessel employed in such trade; and that it was not a warranty that she was sheathed. *Martin v. Fishing Ins. Co.*, 389.

6. A vessel was insured "at and from Calais, Maine, on the 16th day of July, at noon, to, at and from all ports and places to which she may proceed in the coasting business, for six months." It was *held*, that the policy attached, although there was no evidence that the vessel was at or prosecuting her voyage from Calais on the day named, it appearing that, when the policy was made, neither party knew when the vessel sailed from Calais, and that it was their intent to insure on time, without regard to the place where the vessel might be. *Ibid.*

7. In an action upon a policy of insurance on a vessel, no evidence was offered of any preliminary proof being exhibited to the insurers before the action was brought, except an abandonment, a demand of payment, and an agreement of the parties to refer the case to arbitrators; but it appeared, that the insurers had always refused payment, on the ground of the unseaworthiness of the vessel, and not on the account of the want of further preliminary proof. It was *held*, that the insurers had thereby waived their right to any further preliminary proof, or that it might be presumed that they had had such proof. *Ibid.*

8. If the vessel is seaworthy when the policy attaches, it will be presumed that she continues so during the time of the risk, in the absence of any evidence rebutting such presumption. *Ibid.*

9. The plaintiff and L. bought a vessel together, and the plaintiff indorsed the notes given by L. for his proportion; but no writing passed between the parties, at that time, in the nature of a mortgage or otherwise. The plaintiff was thereupon insured upon such vessel, for whom it concerned, to the amount of her value, the policy being made payable to him; and before a loss occurred, L. executed a bill of sale of his proportion, to the plaintiff. It was *held*, that the plaintiff thereby became entitled to recover the whole amount of a loss, for his own use. *Ib.*

JURY.

Attorneys at law, though retired from practice, are exempted from serving as jurors. *Ex Parte Swett*, 1.

LEGISLATION.

ILLINOIS.

THE legislature of this State adjourned on the fourth day of March. Of the various acts passed during the late session, the two following are among the most important.

REVENUE.

A new mode of taxation has been adopted. The first section of this act provides "that all lands, tenements and hereditaments, situated in this State, claimed by individuals, or bodies politic or corporate, except such lands as may be owned by societies or corporations for the purpose of burying ground, church ground, and grounds for the use of literary institutions, not to exceed ten acres, whether by deed, entry, patent, grant, bond for conveyance, or otherwise, except lands belonging to the United States, or this State, and such other lands as are exempted from taxation by the terms of the compact between this State and the United States, are hereby declared to be subject to taxation; also, the following personal property, viz; stud horses, asses, jennies, mules, horses, mares, cattle, *slaves, and servants of color*, clocks, watches, carriages, wagons, carts, and money actually loaned, stock in trade and all other description of personal property, of the stock of incorporated companies: and for the purpose of equalizing the taxes, so that every person shall pay a tax in proportion to the value of the property he or she has in possession, the aforesaid property declared subject to taxation shall be valued according to the true value thereof."

The 15th section provides for "a tax of twenty cents upon every hundred dollars worth of taxable property, "to be levied and collected from the owners of such property," &c., "for the purpose of supporting the government and defraying the necessary expenses attendant upon the enactment, administration, and execution of the laws of the State." The 20th section gives the county commissioners power to "levy a tax for county purposes; which tax shall not exceed one half per cent. upon every hundred dollars worth of real and personal property."

By the 43rd section it is enacted, that "deeds executed by the sheriff shall be prima facie evidence" of the following facts,

viz: "(1) That the land conveyed was subject to taxation at the time the same was advertised for sale, and had been listed and assessed in the time and manner required by law. (2) That the taxes were not paid at any time before the sale. (3) That the lands conveyed had not been redeemed from the sale at the date of the deed. And shall be conclusive evidence of the following facts: (1) That the land was advertised for sale in the manner, and the length of time required by law. (2) That the land was sold for taxes as stated in the deed. (3) That the grantee in the deed was the purchase. (4) That the sale was conducted in the manner required by law; and in controversies and suits involving the title to land claimed and held under and by virtue of a deed executed by the sheriff as aforesaid, the person claiming title adverse to the title conveyed by the deed, shall be required to prove, in order to defeat the said title, either that the said land was not subject to taxation at the date of the sale—that the taxes had been paid—that the land had never been listed and assessed for taxation, or that the same had been redeemed according to the provisions of this act—and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of the State; but no person shall be permitted to question the title acquired by the sheriff's deed, without first shewing that he or she, or the person under whom he or she claims title, had title to the land at the time of the sale, or that the title was obtained from the United States or this State after the sale, and that all taxes due upon the land have been paid by such persons, or the person under whom he claims title as aforesaid."

The time of redemption is fixed at two years from the time of sale, after which the deed afore-mentioned is to be given by the sheriff if the land is not redeemed. Infants, femes covert, and lunatics can redeem "within one year from the time the disabilities of such persons shall cease to exist," and after the youngest of the former shall have arrived at the age of twentyone years, where several of them are jointly, or jointly and severally interested. The other section of this act, and a supplementary act not alluded to, prescribe the mode of assessment and collection of the taxes; the number of sections in both are seventyone.

LICENSES.

All former acts relating to tavern licenses are repealed. By this act the county commissioners are empowered to grant licenses to keep groceries upon conditions of the payment of not less than $25, nor more than $300, and of giving a bond to keep "an orderly house," and not to permit "any unlawful gaming or riotous conduct" therein. They may "reject or grant" all applications for this purpose, and revoke licenses "whenever they may be satisfied that the privileges granted have been abused, or that the person to whom the license was granted has violated the law." Licenses are confined to "one place or house," to be described therein. By the term "grocery," is intended "all houses and places where spirituous or vinous liquors are retailed by less quantities than one gallon." Incorporated towns are authorized to control licensing within the same.

The last section provides that "if a majority of the legal voters in any county, justice's district, incorporated town or ward in any city, shall petition the county commissioners court, or other authority authorized to grant licenses, desiring that spirituous liquors shall not be retailed within the bounds" of their precincts as above mentioned, "in that case it shall not be lawful to grant any grocery license" therein, "until a majority of the legal voters in said county, incorporated town, justice's district, or ward shall, in like manner petition for the granting of such license."

OBITUARY NOTICES.

In Dublin, on the 11th of February, the Right Hon. W. Saurin, in his eightythird year. He was twenty years attorney general of Ireland.

In Montreal, on the 8th of March, the Hon. Michael O'Sullivan, chief justice of the court of king's bench for that district. Mr. O'Sullivan was appointed by lord Durham to the office of chief justise, on the retirement of chief justice Reid, in November, 1838, and had presided in the court for but one term—that of February last.

In Boston, on the 24th ult., Chas. P. Sumner, Esq., sheriff of Suffolk county, aged 63.

Mr. Sumner was the son of Capt. Job Sumner, of Milton. He was graduated at Harvard University in 1796. Judge Thacher, John Pickering, Esq., Dr. James Jackson and Prof. Leonard Woods were his classmates. His rank as a general scholar, was not high, but he had a cultivated literary taste, and was something of a poet. On commencement day, his part was a poem on "Time;" and while in college he published a poem entitled "The Compass," which had considerable merit. He studied law with the late Judge Minott, of this city, and after spending sometime in Georgia, he commenced the practice here. His success was not great as a lawyer, and he accepted the appointment of deputy of the sheriff. After serving in this capacity several years, he was appointed, on the resignation of Judge Hall, high sheriff of the county. He was a man of Roman firmness, of great integrity, and the fact of his remaining in office about twenty years, is evidence that he discharged his duties faithfully.

In Lowell, Mass., on the 17th ult., Hon. Luther Lawrence. He fell from a height of about eighteen feet into a wheel pit of a new mill, belonging to the Middlesex company. He was taken out in a state of insensibility, and survived about half an hour. He had been with a friend who happened to be in the city, to point out to him the progress of the work, and slightly tripping near the edge of the pit, fell in. "Mr. Lawrence was the eldest son of the late Samuel Lawrence of Groton, a respectable farmer, and a devoted soldier of the revolution. He was born in Groton in 1783, and was graduated at Harvard College, in 1801. He studied Law with the late Timothy Bigelow, who is eminent in the annals of our commonwealth,—whose sister he afterwards married. He practised law with distinguished success, for many years, and after having served repeatedly as representative, was chosen speaker of the house of representatives. About ten years ago he removed to Lowell, and after representing that town in the legislature, he was, two years ago, elected mayor of that city. In addition to his public duties, he was actively engaged in private business. As a magistrate, he was faithful and devoted to his public trust: as a business man, he was faithful and punctual in all his operations: as a citizen, he was liberal and full of public spirit: as a friend and neighbor, he was generous and charitable. In all his social and domestic relations, he was cheerful, agreeable, kind and benevolent. Elevated in society, as he justly was, he had neither false pride, nor affected condescension. He was in short, a sincere christian without display, and an upright man without ostentation. Few men have lived more worthily, and few have died more generally lamented."

In Clinton, Louisiana, General Eleazer W. Ripley. We extract the following notice of this distinguished individual from the Clinton Louisianian.

"Gen. Ripley was born at Hanover, in the state of New Hampshire, in the year 1782. His father, the Rev. Sylvanus Ripley, was professor of divinity in Dartmouth College; and his maternal grandfather, the Rev. Eleazer Wheelock, was the founder of that venerable and useful institution, and was alike eminent as a divine and philanthropist. Professor Ripley was accidentally killed in early life, leaving a large family to the care of his afflicted widow, who applied herself to the education of her children with a mother's ardent affection, aided by a mind highly cultivated and improved. At the age of eighteen, Gen. Ripley received from Dartmouth College, at the time of his graduation, the highest honors of the institution, and immediately commenced the study of the law, and subsequently entered upon the active duties of his profession at Waterville, at that period within the jurisdiction of Massachusetts. In the year 1807, he was returned as a member of the legislature of that state; and in the year 1811, was elected to preside over the deliberations of the house of representatives, upon the speaker's chair becoming vacated by the appointment of the Hon. Joseph Story to a seat upon the bench of the supreme court of the United States.

Having removed his place of residence to Portland, he was elected in 1812 to represent the conjoined counties of Cumberland and Oxford in the state senate. The difficulties which existed between this country and Great Britain, having finally produced an open rupture, he received in March, 1812, an appointment in the army of the United States, but prior to entering upon its duties, he took his seat for a limited time in the legislature, and ex-

erted great influence in effecting an adjustment of the difficulties that existed at that period in relation to the moneyed institutions of the state. To delineate the conspicuous part which he performed during the war, would require us to write the history of the campaigns upon the northern frontier, and to enter into particulars which would become too prolix for the space to which we are necessary limited. They are embodied in the history of our own country; and after ages will offer up the tribute of admiration and gratitude to the memory of his name, whose military genius conceived, and whose personal efforts contributed so much to the success of that brilliant and daring achievement which rendered the battle of Niagara so glorious to the American arms, and crowned the brave soldiers engaged in it with imperishable fame. The most gratifying tokens of esteem were tendered to him; and upon the reduction of the army at the return of peace, he was retained in service with the rank of Major General—and was actively employed, in addition to his other duties, in planning and superintending the construction of the numerous fortifications upon our southwestern frontier.

He subsequently resigned his commisssion, and resumed the practice of his profession in the state of Louisiana with distinguished success. He was afterwards elected to represent this and the adjoining parish in the state senate; and in 1834 and 1836, was returned as a member of congress from the third congressional district of this state, but ill health precluded his being a candidate for re-election at the recent canvass; and at last, with his feelings deeply lacerated by the harassing and protracted controversy attending the attempt at an adjustment of his military accounts, and upon which a most triumphant verdict was rendered in his favor by a jury of his country, with his health in its enfeebled state, receiving an additional shock by the brutal murder of his gallant and only son under the unfortunate Fanning: his naturally iron constitution, impaired by the wounds received in the service of his country, has surrendered up the noble spirit by which it was animated, and the still breeze of heaven whispers over the grave of the lamented patriot and soldier. He is gone—and while his bereaved widow mourns over the departure of a kind and affectionate husband: while his daughter grieves at the loss of a tender and beloved father; and while kindred and society lament the decease of one, who was open to the warmest sympathies of our nature, patriotism will shed the tear of sorrow over the urn of her champion, and the memory of the gallant and beloved Ripley, will endure as long as the brightest pages of American history, and the recollection of the honors due and awarded to the brave.

CRITICAL NOTICES.

REPORTS OF CASES argued and determined in the Superior Court of Judicature of New Hampshire. Part 1—Vol. VIII. Concord: Published by Marsh, Capen and Lyon. 1839.

THIS volume, or part of a volume, contains the cases decided in New Hampshire from the July term, 1835, in Grafton, to the July term, 1836, in Cheshire. The cases appear to have been prepared with great care; the statements of facts and the arguments of counsel are well drawn up, and the marginal notes are to the point Perhaps some of the cases might have been condensed to some advantage, and the same remark may be made of almost every volume of American reports. The mechanical execution of the work is creditable to the publishers. There are, however, a few blemishes which might well be rectified. There is a want of uniformity in the names of the cases, which may, perhaps, be attributed to the fact, that there is no regular reporter of the court, and the volume may have been, and probably was, prepared by different persons. We notice, in some instances, that the names of the parties are given at full length, and in others the christian name is omitted. We notice, too, in the two last volumes of these reports, that when there is more than one plaintiff or defendant it is sometimes signified thus, "and a," sometimes "et a," and sometimes "& a." Uniformity in these matters is desirable, particularly in a volume so well executed in other respects. We may here remark, that it seems to be the better way to give the whole name. Reports of legal decisions often possess an interest to those out of the profession. They are in one sense repositories of facts of great historical value, because established by tribunals erected for the express purpose of dispensing justice, and of eliciting the truth. Nor can we see any weight in the objection, sometimes made, to their possessing

some little dramatic interest, when it is not inconsistent with the particular purpose for which they are prepared.

Lest our own practice should be cited against us, we may add, that an attempt was made at one time to obtain the full names of the parties to the cases which were reported in the Law Reporter, but as our reports are received from so many different hands, the christian names were often omitted, and we despair of uniformity in this respect, unless we give only the surnames as is done in the present number. This reason does not apply to the reports of cases decided in any one court, as all the documents are, or should be, before the person who prepares the volume.

TREATISE ON THE CONTRACT OF SALE, by R. J. POTHIER. Translated from the French by L. S. CUSHING. Boston: Charles C. Little & James Brown, 1839.

The name of Pothier is so well known, and his character so justly appreciated, that nothing need be said here of the value of his writings; and the well known accuracy of Mr Cushing, whose acquaintance with the civil law is extensive and thorough, is a sufficient guaranty that the treatises on contracts by this celebrated jurist will be furnished to the American lawyer in the best possible manner. The present volume contains the treatise on the contract of sale, and we learn that if it is favorably received, it will be followed by Pothier's other treatises on contracts, to be completed in three, or possibly four, additional volumes; and the last volume will contain a glossary of those terms and phrases of the Roman and French law, which occur in the translated works, and a bibliographical account of the works referred to or cited by the author.

"It would not be difficult to show the importance of a knowledge of these works," says Mr Cushing, in his well written preface, "by reasons drawn from considerations of the utility of the study of the Roman law, in general; but, waiving all these, a further inducement to this publication is presented by the fact, that the existing laws of all that part of the United States, which was purchased of France during the administration of Mr Jefferson, as well as the laws of the British province of Lower Canada, have their foundation in the laws of France, prior to her revolution; so that the works of Pothier possess an authority, in these portions of the American continent, analogous to that of the books of the common law, in others."

THE LAW MAGAZINE; or Quarterly Review of Jurisprudence, for November, 1838. London: Saunders & Benning.

The contents of the present number of this valuable work are as follows:—

Art. I. Mr Warren's Introduction to Law Studies. II. The Election Committee of last Session. III. On Powers to appoint to Children. IV. As to getting in the Legal Estate. V. On evidence by comparison of Hand-writing. VI. The Abolition of Arrest Act. VII. Life of Lord Eldon. VIII. Lord Durham s Ordinances. Digest of Cases; Abstract of General Statutes; Events of the Quarter; List of new Publications; Index.

The first article is a cutting review of Mr Warren's Introduction to Law Studies, of which it is said:—"His work evinces considerable vigor and vivacity combined with a sad lack of judgment and taste, a wide range of reading ill digested and infelicitously applied, an almost entire absence of original reflection, and no practical or available acquaintance whatever with the actual wants, habits, modes of thought, feelings, prejudices, hopes, prospects, advantages or disadvantages of the bar."

REPORTS OF CASES argued and determined in the Supreme Judicial Court of Massachusetts. By OCTAVIUS PICKERING, Counsellor at Law, volume XX. Boston: Charles C. Little & James Brown, 1839.

This is the second part of the twentieth volume of Mr Pickering's reports. The first part was published several months ago, pursuant to the act of 1838, requiring the reports of all questions of law argued and determined before the first day of September in each year, to be published on or before that day. The part before us contains the cases from the September term, 1838, at Lenox, to the October term, in the same year, at Worcester. Reports of several of these cases were published in the first volume of the Law Reporter.

MISCELLANY.

BOSTON MUNICIPAL COURT.

THE appointment of a new sheriff of Suffolk county seems a proper occasion for a few remarks respecting one of the most important duties of that officer—that of preserving order in the courts of justice. Without intending to cast the least reflection upon the late sheriff, it may be remarked, that many habits of disorder have grown up in some of our courts, which should be checked. We

refer now more particularly to the municipal court, and we shall speak with the more freedom as that court, now that appeals in criminal cases are taken away, ought to take a higher rank than it has heretofore done in the estimation of the members of the profession, and the public generally. That court was for many years quite distant from the business part of the city, and it never received that share of public attention which its importance demanded, or the extensive learning of the judge who presides over its deliberations seemed to deserve. It is now held in the new court house, and by the recent act of the legislature, its importance is very much enhanced. There are, however, several circumstances wanting to its entire respectability, many of which are very obvious.

In the first place, no court can long maintain its dignity without the constant presence and support of an enlightened and respectable profession. But the accommodations for the members of the bar in this court are of the worst kind, and it can hardly be expected, that there should exist between them and the bench those feelings of courtesy—respectfully offered on one side and received with dignity on the other—which might be the result of a more constant intercourse. In most court rooms, wherever the common law is known, there is a particular place designated for the profession to occupy. This is generally immediately before the bench and in the neighborhood of the juries' and the prisoners' box. It is called *the Bar*. Now, it is not intended to deny, that there is such a *place* in the municipal court, but to what uses is it devoted? It is entirely occupied two days at least of every term by the grand jury, and it so happens, that when this body make their presentments and the prisoners are arraigned, is the time of all others when the members of the bar most need to be present, and require some sort of accommodation. And when the grand jury are dismissed, the bar are in no better condition. Every trial of interest usually calls together a crowd of people, who, in their anxiety to hear and be accommodated, coolly take possession of the seats within the bar; and although the counsellors immediately engaged in the trial generally get accommodated, any other lawyer who may wish to be present to witness the proceedings from motives of curiosity, or with the wish of profiting by the trial, or, perhaps, with a desire of informing himself respecting the merits of the cause in reference to others in which he may be engaged,—must stand behind the railing, or crowd round the bench, or sit on the tables! We recently saw the constabulary fingers of veteran Reid laid on the collar of a legal gentleman who was standing within the bar, and that officer directed him to sit down, (every seat being occupied!) or stand without the bar, probably because he was in the light of some gentleman loafer who was in the place to which he had no right.

These remarks can scarcely give offence to any person, because they are made under the impression, that it was intended originally, that a place should be furnished for the members of the bar.[1] If such is the case, why is it not secured to them? We seldom hear of jurymen being crowded out of their places, and we believe that the seats usually appropriated to the prisoners are undisturbed, however much vacant space there may be in that quarter of the room. Comfortable seats should be appropriated to spectators and witnesses, and they should be pointed out to them. Is it said that lawyers are seldom present, and it seems hard to cause people to stand behind the bar when there are a plenty of seats within unoccupied; the answer is at hand, that the experiment has never been fairly tried, and no one can say how many will attend until proper accommodations are afforded. Besides, are there not other vacant places in court? Are there not two unoccupied seats on the bench? And why are not these appropriated to the use of spectators?

Again, in the other courts in this city and commonwealth, it is customary to have upon the tables sufficient stationery for the use of the bar. In this court a different system is pursued. A pen is rarely seen, except it be some antiquated remnant that the county attorney has thrown away, but a sheet of fair white writing-paper is a phenomenon indeed. To be sure, one may receive on request a half sheet or two, and when that is used up, as much more, if he can show good cause, but it comes hard, and it is not *very* uncommon for gentlemen to carry their stationery in their hats.

There are other evils which detract more or less from the respectability of this court. Sufficient attention is not paid to strict order, particularly among the officers of the court. This is the tendency in a criminal court, but it is a bad state of things. Undivided attention is not given to the trial in progress, but while the judge is examining a witness or charging the jury, or while the county attorney is speaking, the other officers

[1] This impression would seem to be well founded, from a card which is somewhat ostentatiously displayed at the private entrance to the court, and of which the following is a literal copy:

"THESE STEPS lead to the PRIVATE ENTRANCE of the MUNICIPAL COURT ROOM, intended only for the COURT, ATTORNIES, JURORS, OFFICERS, and *witnesses*. *All other persons* are requested to enter that COURT ROOM by the PUBLIC STAIRCASE in front of the building on COURT-STREET."

are arranging matters for the next cause, or are attending to private business, and the noise and confusion are sometimes extremely annoying.

There is another circumstance attending the trials in this court, which ought to be noticed. It is doubtless entirely proper that prisoners in going to and from the jail should be properly secured, but it is entirely improper, that they should be brought into the presence of the court, chained together. Why cannot this disgusting spectacle be prevented? Why cannot the prisoners be taken to some room and there be released from their hand-cuffs before they appear in court? When it is recollected, that many of them are innocent, and have been arrested on vague suspicions merely, it seems a refinement of cruelty and a very unjust thing to bring them into a crowded court room chained together like condemned felons. The public would be equally secure by avoiding this spectacle, the respectability of the court would be somewhat increased, the feelings of men who are perhaps innocent of the crimes charged to them, would be spared; and why is it not done?

We have said more than we intended, but not so much as we might say; and not so much as the importance of the subject would bear. There are no courts where dignity and good order are so indispensable, as those of criminal jurisdiction. Dealing as they do with the worst passions of men, and coming in contact with hardened offenders, it is as necessary for the benefit of the criminal as for the security of the public, that the proceedings should be characterized by moderation and dignity; and all should feel that they are directed by even-handed justice—that the goddess herself is present, blindfolded as she is represented.

UNPROFESSIONAL CORONERS.

Mr Wakely, the acute and able editor of the London Lancet, has lately been elected coroner for Middlesex. His opponent was Mr Adey, a lawyer. In one of his speeches to the electors, Mr Wakely related a number of anecdotes, showing how necessary it is for a coroner to possess medical and surgical knowledge. Some of these anecdotes were amusing enough, and all strikingly illustrative of the point in support of which they were told.

"I will relate to you," said he, "a case which occurred in a neighboring county. Two brothers lived in the same house, by the side of the Thames. One of these brothers, who was a maniac, suddenly disappeared. Suspicion attached to the other brother that he was the murderer. As years elapsed, still the suspicion adhered to him, producing the utmost misery in the family. At length repairs were made in the house, and at the foundation of it a skeleton was discovered. The suspicion was revived. An inquest was held on the skeleton by an attorney coroner, and a jury as well acquainted with skeletons as he was. All these persons concerned in making this medical inquiry, understood nothing of the subject.

"The jury were equally ignorant with the coroner; that coroner was an attorney, and was necessarily incapable of eliciting truth from a medical witness, except by mere chance. They made up their minds, and were on the point of returning a verdict of wilful murder against the brother, when, fortunately, a surgeon happened to come in, and exclaimed, 'Stop, stop, you are about to commit some horrible mistake;' and he had discovered that the skeleton on which the non-medical coroner and the non-medical jury were holding their inquest, was the bones not of a male but of a female. But the advocates of the attorney-coroner say, that the trial before the coroner is only preliminary; that there is another court in which an opportunity will be offered to the accused for calling professional testimony; but, gentlemen, when once the coroner's jury have recorded their verdict, the skeleton is buried—it is no longer in the court to speak silently but most eloquently to all those who understand anatomy. The skeleton is buried, the evidence is inhumed. Now, I say, with men of humane minds, men who love charity and justice, one such fact as that, if there were not another, ought to determine their choice.

"I believe it will be admitted that I know as much of law as Mr Adey, and if that be so, I think I know something more of physic than he does. (Laughter and cheers.) If Mr Adey had been the coroner on that occcasion, he would not have known whether they were the bones of a female or a rhinoceros. (Roars of laughter.) How should he know it when he never made the subject his study as I have? I believe you all recollect the occasion of the last election, when one gentleman told you that an attorney coroner did not know a dead man from a living one. It was well known that after the inquest had been held, the dead man got up and laughed at the coroner. (Cheers and laughter.) You all recollect the case of Catherine Moody, in the London Hospital, upon whom no less than three inquests had been held by a coroner. (A voice in the crowd, 'That was Mr Unwin.') Yes, Mr Unwin was the coroner. Mr Fuller, a surgeon in the London road, was examined on that occasion.

"In the first instance, a verdict of 'accidental death' was brought in—(a laugh); and in the se-

cond it was a verdict of 'natural death;' and after they had left the room they were requested to return, and found the woman sitting up, saying, 'Good God, I wonder are they going to bring me those oysters!' On another occasion a man fell from his horse, returning from a fair in the Mile-end road. An attorney coroner looked at him, and at once pronounced him dead. (Laughter.) He was put into a room, an inquest was held, and a verdict of accidental death returned. In the middle of the night, the man being in his shroud and not liking his quarters, turned round and fell upon the floor. He called loudly for assistance, and one of the watchmen under the old system broke open the door, and seeing the man in his shroud, cried out, 'Don't think to frighten me with your shroud, I know you vell enough, you're one of the rascally resurrectionists. I'm not to be done in that way; I shall take you off to the watch house.' (Great laughter.) And so he did. (Laughter.) The poor fellow was liberated next morning; but another misfortune had not been foreseen, for the undertaker sued him for half a crown for the use of a shell."

CONSULS AND SEAMEN.

From the United States Gazette.

In a late trial of a claim for wages by a seaman, before Judge Hopkinson—the captain had imprisoned the man at Rio Janerio for alleged misconduct, and offered the certificate of the consul to justify the proceeding and prove the offence—the ship came away and left the man in prison. In speaking of this part of the case, the judge said he had no doubt that this proceeding on the part of the captain was altogether illegal and unjustifiable. That he had repeatedly expressed his disapprobation in strong terms, of the practice of putting our seamen into foreign jails and dungeons, at the mercy of the police officers, for offences by no means requiring this severe and extreme remedy. For ordinary misconduct or insubordination, the law gave the master of a vessel power sufficient to enforce obedience and maintain discipline on board his vessel—that it is only in cases of extraordinary violence, such as was dangerous to the vessel or those on board of her, that a man should be taken on shore and thrown into a prison; every act of passion or insubordination is called mutiny, and the offender is hurried off to an unwholesome confinement, often in a dangerous climate. In the case before him, the judge said the man had been many months on board the vessel without incurring any punishment—he had a quarrel with the mate, in which it is uncertain which of them was most in fault; and the second day after it, when it was supposed to have gone over, and no misconduct had occurred in the meantime, a boat was sent to the ship with a police officer, and the man was carried off to a prison without a hearing or any examination of the charge, except such as the captain chose to give to the consul. The judge said he would take this occasion to repeat what he had more than once said before and to correct an error into which captains continue to fall. They seem to believe that if they can get the order or consent of the consul for their proceedings, it will be full justification for them when they come home. He wished them to understand that he would judge for himself, after hearing both parties and their evidence, of the legality and necessity of these summary incarcerations; and the part the consul may have taken in them would have but little weight with him. He said he had never known an instance in which a consul had refused the application of a captain to imprison a seaman; furnishing him with a certificate, duly ornamented with his official seal, vouching for the offence of the victim, of which, generally, he knew nothing but from the representations of the captain or officers of the vessel. The judge said he never suffered their certificates to be read; that they were weaker than *exparte* depositions. He then made some remarks that may be worthy of the attention of our government. He said, our consuls, unfortunately, are merchants depending entirely upon the profits of their commercial business for their living, especially upon consignments from the United States; that it is, therefore, of a primary importance to them to have the good will of the masters of vessels, that they may make a good report of them to their owners. He said, that an American gentleman of high intelligence, who has travelled much and known many of our consuls, has, in the book he has published, expressed his regret that they are not supported by salaries from the public treasury. As they now are, these important appointments are placed exclusively in the hands of merchants, who he says, "are under strong inducements to make their offices subservient to their commercial business."

SING SING STATE PRISON.

An investigation, recently made into the affairs of this institution, discloses a state of things almost incredible. Whatever may have been the motives which induced the legislature to direct an investigation, and whatever use politicians in New York may make of the result of it, the truth cannot and should not be concealed, that most shocking scenes of cruelty have been enacted within the walls of the Sing Sing prison. The following remarks from

the New York Star are fully borne out, we think, by the evidence taken before the legislative committee. And it may here be remarked, that the testimony of the subordinate officers of the prison was given on an express understanding, that their names should not be disclosed, which agreement of the committee was promptly repudiated by the house of assembly, on the ground that they had no right to make any such promise.

A reform in prison discipline, has, for the last 30 years, occupied the attention and devoted industry of some of the most enlightened men in Europe and America. The severity of the laws, which punished various crimes with death, urged the humane and intelligent to devise some mode by which the shedding of so much blood might be checked, and a wholesome substitute adopted. Our state prison and penitentiary systems were, at length, projected; and so happily has the experiment worked, that commissioners have been sent from Europe to inspect our prisons, and report the details for general adoption; and we find our projects adopted, and an amelioration in criminal laws every where encouraged. As the object of imprisonment at hard labor is reformation, by solitary confinement—by industrious pursuits—by temperance —by calm reflections and by religious demeanour, criminals, on serving out their alloted time, may be restored to society, born again, as it may be said, to good and proper conduct—redeemed and regenerated; profiting by the past and honest in the future. But this triumph of a humane system is entirely dependent on the persons into whose care and inspection the prison and its inmates are confided, and who, by their vigilance, firmness, humanity, honesty and good faith, carry out the benevolent objects contemplated by the reformation. It was, therefore, with deep regret, that we read the testimony taken before the committee of our legislature on the conduct of the agent and keepers of the state prison at Sing Sing; and fervently hope that the document may not reach Europe, and thus inflict a deep stain on the humanity and justice of our country.

The investigation was urged by Mr Wells, editor of the Hudson River Chronicle, who, under every obstacle, persecution and legal proceedings—under every threat, with a courage and devotion and humanity, which does him great honor, insisted upon an enquiry, and carried it firmly out until the evidence, we regret to say, exhibited such shocking acts of depravity, cruelty and injustice, that Gov. Seward felt it due to the honor of the state and its outraged laws, to ask the concurrence of the Legislature to the removal of all the parties concerned in these transactions.

It appears from the testimony of legal witnesses, that the horrors of the Inquisition in their worst times were mild in comparison with the cruelties practised at Sing Sing. Take an example or two. Giles G. Leach, of Massachusetts, agent at Sing Sing, for the Boston Leather Company, says that Marshall the deputy told him

"If a convict spoke saucy to him, to knock him down with the first thing he got hold of, and kill him; has seen the keepers strike often with a cane; has seen a convict by the name of Howell, (or sometimes called Crummell,) whipped three days in succession by Hodgson, one of the assistant keepers: stripped naked, ropes around his wrists, made fast to a vice, arms extended; two hundred lashes at each time, or more; a part of these blows were put on with a cat wound with wires: Pinckney used the cats wound with wires, about an inch on the ends; each blow would cut through the skin, or as many cuts as there were cats; two or three were engaged in the whipping, but only one man used the cat wound with wire to his knowledge.

One convict by the name of Sherwood, a young man, came into the prison smart and active: became insane; was whipped a good deal for not doing work enough before he became insane; was under the charge of Vinson; Sherwood grew worse; became an idiot in consequence of frequent beating and whipping, as he believes; sent to the hospital and was pardoned out."

A witness by the name of Lent swears, that a prisoner by the name of Little was so whipped by the agent, that he actually drowned himself in the river.

Convicts have been so horribly scourged and starved as to become maniacs, and then awfully cattled to bring them to their senses. Prisoners have had their heads crushed, and arms and ribs broken by blows with deadly weapons, so that being sent to the hospital generally followed such outrages.

Enough of these shocking details, which when connected with bad and unwholesome and scanty provisions, make humanity shudder. Not a day, not an hour, should a single man in that prison be permitted to exercise any further power, if there is authority to remove them. No one denies that convicts are bad men, and require to be dealt with severely; but who will say that this discipline cannot be firmly but humanely exercised? The inspectors of the state prison at Sing Sing, whoever they may be, are as bad as the agents and keepers—nay worse;—they had the power to remove them from office, yet connived at their acts. The authorities of this state must not permit a public and an important institution to be thus abused by their agents.

MONTHLY CHRONICLE.

The most important case which has been decided in Boston recently, is that of the *ship Nathaniel Hooper*. This ship while coming into the port of Boston, heavily laden with a valuable cargo was left by her captain, and was afterwards fallen in with by a brig bound to the same port. The mate and two men were put on board and she was brought to Boston. On her way to that port, those on board engaged the services of several fishermen who assisted them in getting her in. She was then libelled for salvage and the cause was heard by Judge Davis of the district court of the United States. The evidence in the case was very voluminous, making about one thousand folio pages, and eight days were occupied in reading it. The case was managed by Mason, C. G. Loring, Betton, Choate, Bartlett, and Brigham for the salvors, and by C. P. & B. R. Curtis, Blair and Parsons for the respondents. Judge Davis made a decree, giving to the salvors one half of the net proceeds, reserving some points made by the owners and insurers, arising out of the alleged misconduct and perjury of a portion of the salvors, as bearing upon another part of the case, and to be decided when the question as to the division of the salvage was considered. The opinion was quite brief. The judge decided that the Nathaniel Hooper, though not derelict when the master and crew first left her because they left with the purpose of return, yet became derelict when the master and crew afterwards gave up the pursuit of her in the belief that she had sunk. And, being thus a case of derelict, he felt bound by recent decisions to apply the rule of one half, as he considered this rule now so firmly established as to leave the court almost without a discretion in the matter, unless there were manifest reasons for reducing the salvage, of extraordinary force, which reasons he could not clearly perceive in this case. From this decree the owners and insurers claimed an appeal.

In the United States district court in Boston, on the 21st ult., Josephus Pickens, of Middleborough, was tried on a charge of having wilfully obstructed the U. S. mail in the town of Taunton. Charles R. Shippen, the driver from New Bedford to Boston, testified that when he was near Taunton, he overtook the defendant, who was driving a team of wood, and who refused to let witness pass, alleging that the road was his and he would keep it. After making efforts to get by, and to persuade the defendant to turn out a little, the driver requested the passengers to get out of the stage, and they held the defendant, while witness turned his team and got by. The jury found the defendant guilty, and he was sentenced to pay a fine of five dollars and costs, which amounted to nearly $100, the amount which he might have been fined.

The law term of the supreme judicial court, for Suffolk, closed on the sixth day of April. The court was in session twentyeight days. It is thought that fewer cases were disposed of than usual. It may not be known to many of our readers, that the court during this term have but one session in a day, and they read opinions every Monday morning. This generally occupies a large part of the forenoon. It has been suggested by a writer, in relation to the practice of reading written opinions by the vice chancellor in New York, that much time would be saved to good purpose by delivering these opinions to the clerk for the inspection of those interested, and to omit reading them in public.

By the recent resignation of Charles P. Sumner, Esq., a short time before his death, the office of sheriff of Suffolk county became vacant and there were many applicants for it. Henry H. Huggerford, Esq., a lawyer by profession, and who has discharged the duties of a deputy of the sheriff for thirteen years past to general satisfaction, was a very prominent candidate, and we believe nearly every member of the bar in the city signed a petition in his favor. Joseph Eveleth, Esq., who received the appointment, not being so well known to the bar, his claims were not particularly urged by them, but he received the support of a very large number of influential gentlemen in the county, and we believe his appointment to the office afforded general satisfaction. He was formerly a merchant.

In the city of New York, there seems to have been much unnecessary excitement growing out of the trial of a vagabond, named George W. Dixon, for a libel on a gentleman, of such an aggravated character, as is said to have caused his death. The jury were unable to agree, and the culprit was admitted to bail in the sum of $900 for this and two other charges of libel.

In the legislature of New York several important acts respecting internal improvements have been adopted, or are under discussion. We shall notice them in the proper place.

We give an account on another page of singular developments recently made respecting the state of things in Sing Sing prison.

An able and eloquent speech, on judicial reform, was recently made in the senate by Mr Verplanck, from which we shall probably make large extracts in a future number, if we are unable to present the whole of it to our readers.

In Philadelphia, Judge Hopkinson, of the United States district court, is reported in the United States Gazette, to have recently held, that when a sailor came before that court, claiming damages for an alledged abuse, or redress for ill treatment, he must be prepared to show his willingness to have done his duty, and that he has faithfully, and without show of temper, obeyed the orders of his officers; and on the other hand, that when the captain or officer uses a rope, (the ordinary instrument of punishment,) on board his vessel, for the purpose of deserved chastisement, unless carried beyond reason, the seaman must not look to that court for protection. But if a deadly

weapon, (except on necessary occasions,) were used by the officer, he would deem it his duty to protect the seaman.

The great trial in Philadelphia between the two branches of the Presbyterian church, having resulted in a verdict for that branch styled the new school, the other has moved for a new trial, and by the last accounts, learned counsel were arguing the cause before the supreme court.

In New Haven, Conn., an action was lately tried in the supreme court, in which the plaintiff, who had been a resident of the state of Alabama in the capacity of a clerk, demanded damages against the defendant for having written a letter addressed to the postmaster of the place where the plaintiff resided, informing him that the plaintiff was a violent abolitionist, and advising the people of the place to treat him as he deserved, intimating that a coat of tar and feathers would not be amiss: in consequence of which letter the plaintiff was put in danger of personal injury, and was driven from the state, to the injury of his business. The writing and receipt of the letter were proved, but the evidence of actual injury therefrom was not conclusive. The jury could not agree on a verdict.

At the March term of the court of common pleas for Huron county, Ohio, a Miss Marietta Washburn obtained a verdict for $1145 damages against one Hiram Wells, for certain slander. With the true magnanimity of a virtuous and high minded girl, she immediately came forward, and forgave the payment of all except $200 and the costs.

Judge Thomson, of Indiana, at a late sitting of the circuit court, at which he presided, is said to have decided, that if a subscriber to a periodical failed to notify the editor to discontinue the paper at the end of the term subscribed for, or pay up the arrearages, he was bound for another year.

NEW PUBLICATIONS.

Reports of Cases argued and determined in the Superior Court of Judicature of New Hampshire. Part I. Volume VIII. Concord: Published by Marsh, Capen & Lyon, 1839.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Octavius Pickering*, Counsellor at Law. Volume XX. Boston: Charles C. Little and James Brown, 1839.

Treatise on the Contract of Sale, by R. J. Pothier. Translated from the French, by *L. S. Cushing*. Same.

A Digest or Abridgment of the American Law of Real Property. By *Francis Hilliard*. Same.

Reports of Cases argued and determined in the High Court of Chancery, from 1757, to 1766; from the manuscripts of Lord Chancellor Northington. Collected &c. by the Honorable *Robert Henley Eden*, of Lincoln's Inn, Barrister at Law. 2 volumes in one. Philadelphia: R. H. Small.

Reports of Cases argued and determined in the High Court of Chancery in Ireland, during the time of Lord Chancellor Manders, from 1807 to 1814. By *Thomas Ball* and *Francis Beatty*, Esqrs., Barristers at Law. 2 volumes in one. Philadelphia. R. H. Small.

A Practical Treatise on the Law of Contracts not under Seal; and upon the usual defences to actions thereon. By Joseph Chitty, Jun. 4th Am. Ed. with notes, by *J. C. Perkins*, Esq. Springfield: G. & C. Meriam.

Reports of Cases argued and determined in the English Courts of Common Law, with tables of the cases and principal matters. Edited by the Honorable Thomas Sargeant, of the Supreme Court of Pennsylvania, and the Honorable Thomas M'Kean Petit, President of the district court for the city and county of Philadelphia. Vol. XXXII. Philadelphia: P. H. Nicklin and T. Johnson, 1838.

A Treatise on the Law of Obligations or Contracts. By M. Pothier. Translated from the French, with an introduction, appendix and notes, illustrative of the English Law on the subject. By *Willam David Evans*, Esq., Barrister at Law. 2 volumes. Second American edition. Philadelphia: R. H. Small, 1839.

The Writings of John Marshall, late chief justice of the United States, upon the Federal Constitution; being the opinions of the supreme court of the United States, delivered by him upon points of law arising under that constitution. With an appendix containing the opinions upon like points, delivered in that court, by other judges, prior to the death of chief justice Marshall. By *James H. Perkins*, of Cincinnati. Boston: James Munroe & Co., 1839.

A statement of Facts in Relation to the delays and arrears of business in the court of chancery of the state of New York, with some suggestions for a change in its organization. By *Theodore Sedgwick, Jr.* New York. A. S. Gould, 1838.

Report and opinion of the Attorney General (of Massachusetts) on the subject of the expenses of Criminal Justice, made to the Senate, under an order passed Feb. 15, 1839.

Opinion of the Court of Appeals of Maryland in the case of the the University of Maryland, delivered by Buchanan, Chief Justice. Baltimore: Lucas & Deaver, 1839.

Preliminary Report of the Commissioners for a revision and Codification of the Criminal Law of Massachusetts, made to the Legislature, February, 1839.

Reports of Cases argued and determined in the Supreme Court of North Carolina, in Law and Equity, June Term, 1838. By *Thomas P. Devereux* and *William H. Battle*. Vol. III. No. 1.